ENGLISH CONSTITUTIONAL LAW

HANDBOOK OF
ENGLISH CONSTITUTIONAL LAW

WITH A CHAPTER ON INDIA

BY

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To

The Loving Memory

of

SIR ASUTOSH MOOKERJEE,

Saraswati, Sastravachaspati,

Kt., C.S.I., M.A., D.L., D.Sc., Ph.D.,

F.R.A.S., F.R.S.E., F.A.S.B.

Eminent as a Judge, Jurist and Educationist

But

Above All

A True Patriot and Lover of his Country

This Book is Respectfully Dedicated

By

His Humble Friend and Devoted Admirer

The Author

PREFACE.

There is no good book on English Constitutional Law *suitable for Indian students*. The want has been keenly felt in India by Professors and Students alike. Of course there are excellent works, notably Dicey's 'Law of the Constitution' and Anson's 'Law and Custom of the Constitution' which every student who can afford ought to read. None of them however would *singly* meet the requirements of Indian students. What is wanted is a clear exposition of the fundamental principles of English Constitutional Law and, as 'English Constitution is essentially judge-made,' an examination of the leading judicial decisions, together with some general idea of the structure of the State with its different organs, the Legislature, the Executive, the Judiciary and the Crown with its Prerogatives—all comprised within a reasonable compass. The author has attempted the task in this modest work and his whole aim has been to create interest in the student and not to produce a cram book. In order to give a clearer conception of the subject, comparisons have occasionally been made with American, French and other systems; and without going into elaborate details of English history just enough reference has been given, necessary to explain the subject. Peculiarities of Indian Constitutional Law have also been noted in their proper places. In preparing the work, the author had to consult many books, but he is chiefly indebted to the valuable works of Dicey, Anson and Halsbury (Laws of England) to which constant references have been made, and the author expresses his deep obligation to those eminent writers.

It was at the suggestion of the late Sir Asutosh Mookerjee that the author undertook to write this book. His feelings can well be imagined, now that the book is out, there is no Sir Asutosh either to point out its defects and shortcomings or to appreciate its merits, if there be any, and the author seeks some consolation by dedicating the book to his memory.

The book had to be rushed through the Press in a great hurry and as a result a few printing mistakes have been overlooked, and what is more to be regretted, the last chapter dealing briefly with the present Indian Constitution and Constitutional Law could not be incorporated. It is hoped to make up the deficiencies in the next edition.

In conclusion the author expresses his best thanks to Mr. Bireswar Bagchi, M.A., B.L., Vakil, High Court, and Professor, University Law College, for kindly preparing the *index* and to Mr. Rama Prasad Mookerjee, M.A., B.L., Vakil, High Court and Professor, University Law College, for preparing the *table of cases*.

CALCUTTA,

J. P. SARVADHIKARI

The 3rd April, 1925

PREACE TO THE SECOND EDITION

In this edition the book has been thoroughly revised and enlarged. In addition to short historical references to trace the growth of constitutional principles in England, use of the comparative method and elucidation of all important principles and case law bearing on the subject, points of difference in all important matters between English and Indian Constitutional law have been noticed. Besides, an altogether new chapter has been added showing the development of the Indian Constitution from the time of the East India Company down to the present day. In short, the author has attempted in this edition to make the book useful not only to students but also to practising lawyers and persons interested in Indian politics.

The author takes this opportunity to express his deep obligation to the Vice-Chancellor and the Syndicate of the Calcutta University for their kind permission to have the book printed at the University Press, and to Mr. J. C. Chakravorty, M.A., Assistant Registrar, for his kind supervision while the book went through the Press. The author is also indebted to his son Mr. Partha C. Sarvadhikari, B.L., Pleader, for revising the *index* and the *table of cases*.

CALCUTTA,

J. P. SARVADHIKARI

March, 1928

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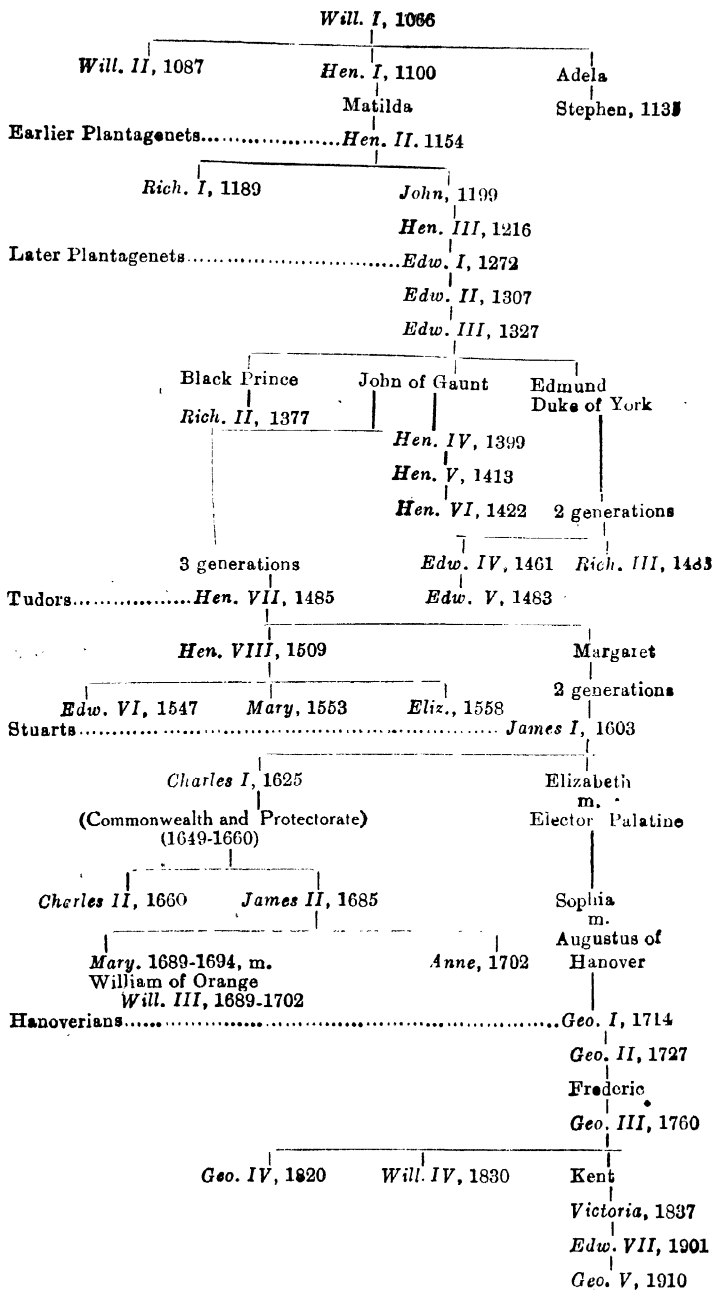
A. & E. / Ad. & E.	Adolphus and Ellis.
A. C.	Appeal Court.
A. I. R.	All India Reports.
All.	I. L. R., Allahabad Series.
App. Cas.	Appeal Case.
B. & A.	Barnewall and Alderson.
B. & Ad.	Barnewall and Adolphus.
B. & C.	Barnewall and Cresswell.
Bev.	Beavan.
Bom.	I. L. R., Bombay Series.
B. L. R.	Bengal Law Reports.
Bing.	Bingham.
Brod. & Bing.	Broderip and Bingham C. P.
Boul. Rep.	Boulnoi's Reports (of the Supreme Court,
C. A.	Court of Appeal.
C. B.	Common Bench Reports.
Cal.	I. L. R., Calcutta Series.
C. C. R.	Court of Crown Cases Reserved.
Ch.	Chancery.
Ch. D.	Chancery Division.
C. P.	Common Pleas.
C. B.	Common Bench Reports.
C. L. J.	Calcutta Law Journal.
C. & P. / Car. & P.	Carrington and Payne.
C. & Mar.	Carrington and Marshman.
C. B. N. S.	Common Bench, New Series.
Cl. & F.	Clark and Finnelly.
Co. Rep.	Coke's Reports.
Cowp.	Cowper's Reports, K. B.
E. & B.	Elis and Blackburn
E. & E.	Elis and Elis.
Ex.	Exchequer Reports.
Ex. D.	Exchequer Division.

F. & F. . . .	Foster and Finlason.
Hal.	Halsbury's Laws of England.
H. L. . . .	House of Lords.
Lah. . . .	I. L. R., Lahore Series.
L. R. Ir. . . .	Law Reports, Irish.
Ld. Raym. . .	Lord Raymond's Reports, K. B.
Mad.	I. L. R., Madras Series.
Mod.	Modern Reports, K. B.
M. I. A. . . .	Moore's Indian Appeals.
Moo. P. C. C. .	Moore's Privy Council Cases.
M. & W. . . .	Meeson and Welsby.
Pat.	I. L. R., Patna Series.
Q. B.	Queen's Bench.
Q. B. D. . . .	Queen's Bench Division.
R. & R. . . .	Russell and Ryan's Crown Cases.
Rang.	I. L. R., Rangoon Series.
Rob. Adm. Rep. .	Robinson's Admiralty Report.
Salk. . . .	Salkeld's Reports, K.B.
Sm. L. C. . . .	Smith's Leading Cases.
St. Tr. . . .	State Trials.
T. L. R. . . .	Times Law Reports
Tho. L. C. . . .	Thomas's Leading Cases in Constitutional Laws.
T. R. . . .	Term Reports.
Vaugh. . . .	Vaughan's Reports, C. P.
Wheat. . . .	Wheaton's United States Supreme Court Reports.
Wils. . . .	Wilson's Reports.

"Some sense of duty, something of a faith,
Some reverence for the laws ourselves have made,
Some patient force to change them when we will,
Some civic manhood firm against the crowd."

TENNYSON (*The Princess*).

Chronological Table of English Sovereigns.



HANDBOOK

OF

ENGLISH CONSTITUTIONAL LAW

BOOK I.

Introductory.

CHAPTER I.

DEFINITIONS AND EXPLANATIONS.

State.—A state is an independent political society or an association of human beings, occupying a defined territory, established for the attainment of certain ends by certain means and whose essential and primary function is to repel aggression from without and to maintain law and order within.[1] It is a politically organised society capable of enforcing its commands and maintaining an orderly existence within the territory. The aims and ideals of different states may be different but what distinguishes a state from other forms of association such as a joint-stock company, etc., is in regard to its essential or primary function which is to maintain law and order within, and repel aggression from without.[2] For this, use of force is necessary and the exercise of the organised physical force of the community, force, judicial and extrajudicial, for administration of justice within the state, and for war outside, is the essential function of every

1. See Salmond's Jurisprudence, Ch. V.
2. See Salmond's Jurisprudence (6th Edn.), p. 93 *et seq.*

political society or state. Government is, thus, nothing but organised force [3] and State may therefore also be defined as " a society of men established for the maintenance of peace and justice within a defined territory *by way of force.*"[4] The maintenance of peace and order is however only a means to an end and the end and aim of all civilized states in modern times is " to aid the individual in the fullest and best possible realization of his individuality," [5] to harmonize individual freedom with the welfare of the state, in other words, to secure as much individual liberty as would be consistent with the rights and liberties of other citizens. Thus the preamble to the constitution of the United States says " we, the people of the U. S., in order to form a more perfect union, to establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity do ordain this constitution for the United States of America."

Juristic conception of the State.[5A]—The above is a concrete idea of the State with its territory and citizens. Juristically the State is an abstract idea in which the political society is regarded as an entity, or an artificial person possessing legal omnipotence. Human agencies necessary to perform its functions constitute its government—the machinery by which the will of the artificial person is expressed and enforced. " The will is expressed by the legislative organ of the government, interpreted by its judicial organ and enforced by the executive organ." Thus juristically the state is to be distinguished

3. See Wilson's State, pp. 26-27.
4. Salmond's Jurisprudence, p. 99.
5. Wilson's State, p. 48.
5A. See Willoughby's Public Law (Tagore L. L., 1923).

from the citizens on the one hand and the Government on the other. Again, as it possesses legal omnipotence or absolute sovereignty, a state cannot be created by another sovereign authority but must come into existence by its own force or " start *de novo.*" Transference of sovereignty is juristically an impossibility and non-sovereign state, a contradiction in terms. The form of its Government—monarchical, republican or whatever it may be—is determined by itself, by its constitutional laws. The state although the author and source of all laws " can bind itself to any extent by its own will either by treaties or by constitutional limitations on the powers of its governmental agencies " and can also alter them whenever it chooses. The state can never act illegally but its government or government officials may.

Main characteristics of the state.[6]—(*a*) *Its independence* ; unless a state is independent of external control it can have no law of its own. Of course absolute independence is an impossibility, for no state can lead an isolated existence, specially in these days of world-wide intercourse resulting from great facilities of communication. There must be various limitations by reason of relations with other states regulated by international understandings. Again in Federal States, there are further limitations by reason of partnership amongst the constituent states. Colonies possessing sufficient autonomy may be called *dependent states* such as Australia, Canada, etc., but they are nevertheless non-sovereign states being constituent parts of a bigger state (British Empire) and as such are not recognised as separate entities in international law.[6A]

6. Salmond's Jurisprudence, Ch. V.

6A. The British Dominions are now regarded practically as sister nations; see *post* Ch. XXIII, ' Dominions.'

(*b*) *Possession of a territory.*—A state must have a defined territory which includes also its territorial waters, within which its will is supreme. The exact character of its authority over the super-incumbent atmosphere has not yet been definitely settled by international law. What are the rights of other states in regard to *aviation* or *radio* are vexed questions which can be settled only by international arrangement. A state without territory is not inconceivable as for instance in the case of a nomadic tribe.[7]

(*c*) *Membership of the state.*[8]—Claim to membership may arise either from citizenship or from residence. Hence there are two classes of members, citizens or subjects and resident aliens. In the one case the bond is personal and more or less permanent, in the other, it is territorial and temporary. In both cases so long as membership continues the relation with the state is one of reciprocal obligation, the state owing protection and good government and the members owing allegiance and obedience to its laws. Citizens enjoy higher rights and privileges and have also correspondingly larger obligations and liabilities than resident aliens.[9] Title to citizenship is a matter of law, *i.e.*, it is a matter to be decided by the state and does not depend on the will of the individual.[9A] Thus under English common law birth within dominions irrespective of descent confers citizenship whereas under French law birth and descent irrespective of place of birth make one a citizen.

(*d*) *Functions of the state.*[10]—In addition to the primary functions of war and administration of justice,

7. *Ibid*, p. 99.
8. *Ibid*, p. 99 et seq.
9. Salmond's Jurisprudence (6th Edn.), p. 101.
9A. See *post* Ch. IV "Citizenship."
10. Salmond, pp. 93-99.

there are various secondary functions amongst which some as legislation and taxation are more important than others, being necessary for the efficient working of the primary functions.

(*e*) *Constitution of the state.*[11]—The state does not mean mere casual and temporary association but implies a definite permanent organisation or structure. The organisation of modern states is highly complex and the essential parts of the organisation are known as the constitution of the state.

Difference between ancient and modern states.—In ancient times, the citizens lived for the state whereas now the state exists for the individual. The ideal of "the individual for the state" has been altered into " state for the individual." [12] With the growth of socialistic ideas it may be said that there is at least a partial reversion to the idea of the individual for the state at least so far as its economic laws are concerned. In the manifesto issued by the Labour party after the last dissolution of Parliament the party pointedly referred to the transformation of the existing economic and industrial system into a genuine socialist commonwealth. In ancient **India** the ideal of the state existing for the people was as fully realised as the ideal of " citizens for the state." Republican States of both types, besides other types, flourished in **India** in post-Vedic Buddhistic times.[12A] Laws which were repugnant to the people were not to be enforced.[13] Again, the modern system of representation is also said to be a new idea. Representative law-making bodies were unknown to the ancients in

11. Salmond, p. 106 *et seq.*
12. Wilson's State, p. 48.
12A. See Jayaswal's Hindu Polity, Part I, Ch. IX.
13. Yaj. I, 156.

Europe. In the democratic states of Greece and Rome each citizen represented nobody except himself But this also is not true of ancient *India*. In the Vedic period there was the *Samiti* or the National Assembly which elected Kings and decided other important questions affecting the whole people. Soon villages and towns came to be regarded as units *represented* in the Samiti by their *Grāmani* or leader. " It seems," says Mr. Jayaswal, " that the village formed the basis of the constitution of the Samiti, if not originally, certainly in later times." Another popular body regarded as twin sister of the Samiti was the *Sabha*. *Naristha* or resolution of the Sabha was, as the name indicates, regarded inviolable. The Sabha besides other functions acted as the National Judicature just as the Samiti also acted as the National Academy. Representation was also acted upon on other important occasions such as coronation of the king, etc., on which traders and artisans were represented by their leaders.[13A] Thus we find that the principle of representation was recognized and acted upon from the very earliest times in India. Lastly, the separation of the different organs of Government into legislative, judicial and executive is also a modern development. In former times the functions were more or less performed by the same individual or body of individuals.[14] Here again ancient Hindu polity was far in advance. The duties were carefully defined and allotted to different functionaries.[14A]

Classification of states.—States may be classified as autocratic, oligarchical or democratic according as the

13A. See " Hindu Polity " by Mr. K. P. Jayaswal, M.A., Bar-at-Law Part I, Chapters II and III.

14. Wilson's State, pp. 540-541.

14A. See Jayaswal's Hindu Polity, Part I, p. 171.

sovereign power is vested in a single individual or in a small or large body of citizens. They may also be classified as unitary, federal or confederate. Unitary state is where there is one single state with one supreme government; federal state where several states are welded together into a single state possessing complete political sovereignty which becomes the central government in which all the constituent parts participate;[15] a confederacy on the other hand is no state in the proper sense, having no sovereign power and where the component states without parting with their individual sovereignty only agree to act in concert in regard to certain matters of common interest such as common defence. The Achæan League, 4th and 3rd centuries B.C., the early Swiss confederation from 1815 to 1840, the short-lived American confederation from 1781 to 1789 and the several German confederacies from 1815 to 1866, may be cited as examples.[16] A further classification may be into sovereign or independent, and non-sovereign or dependent states.

State, an artificial person.—The state is an artificial person, and as such, assumes to itself the right to maintain order, to enforce the rules of conduct it lays down, to possess property and compel the performance of contracts made with itself.[17] It is a juristic entity capable, like corporations, of entering into legal relations with the citizens, capable of suing and liable to be sued in its own courts. In other words the state permits itself in certain matters to be treated as a private or non-sovereign person and thus be amenable to law. In

15. See *post*.
16. See Wilson's State, p. 544. Confederacies of Republican States in ancient India were not rare; see Jayaswal, p. 170 and p. 126, Part I.
17. Anson, Vol. I, p. 14.

England, however, the king being identified with the state, the liability of the state to be sued is subject to the prerogatives of the Crown.[18] In fact, the idea of state as a juristic entity does not receive such full play in the Anglo-Saxon countries as it does in the Continent of Europe.[19]

Law.—Law is the will of the state, expressed either formally in legislation, or less formally, through acquiescence, in customs, concerning its own organisation and conduct and the civic conduct of those under its authority.[20] "All law, whether public or private," says Willoughby, "is, while it remains in force, a substantive limitation upon the *Government* of a state, but not upon the state itself."[20A]

Public and Private Law.—*Public law* deals with the rights which the state asserts to itself against the citizens, and the rights which it permits to be exercised against itself. *Private law* deals with rights which one citizen can enforce against another.[21] Constitutional law is thus a branch of public law.

Sovereign.—Sovereign is the person or body of persons vested with the exercise of supreme authority in a state. In every state there must be a person or persons vested with sovereign power to exercise and control the functions of Government and to conduct and regulate intercourse with other states.[22] Juristically it is the power

18. See *post* Ch. XII under "Identification of the state with the king and its effects."

19. See *post* Ch. XII under "Comparison of proceedings against the state and state officials in England, etc."

20. Wilson's State, p. 69: *cf.* definition of law by the Analytical School.

20A. Fundamental Concepts of Public Law (T.L.L., 1923), p. 91.

21. Anson, Vol. I, p. 14.

22. See *ante*, p. 2.

behind the different organs of the state—the legislative, judicial and executive.

Sovereignty.—Sovereignty means the aggregate or totality of supreme powers in the state. In the abstract sense, it is the legal omnipotence of the state and resides in the state as an entity.

Is sovereignty one and indivisible.—According to Hobbes's theory sovereignty must be one and indivisible. In other words it may be vested wholly in one person or a body of persons, but cannot be vested partly in one and partly in another person or body of persons. This is true only in the strict juristic sense in which sovereignty is but the supreme will of the state regarded as an abstract political entity. As an attribute of the state, sovereignty being its legal omnipotence must necessarily be one and indivisible. But as regards its actual exercise the theory does not fit in with actual facts. In the English constitution the legislative or legal sovereignty resides in Parliament or, as it is expressed, in the Crown in Parliament, whereas executive sovereignty is in the Crown in Council. Sir William Anson therefore rightly observes, "the legislative and executive powers have, as it were, bifurcated, and there is a real dualism in our constitution, the Crown in Parliament and the Crown in Council."[23] There is thus not only a sovereign legislature but also a sovereign executive in the English constitution, each being supreme in its own sphere but the sovereignty is vested in two distinct bodies and not in one and the same. In fact the theory of indivisibility of sovereignty is, in practice, unsuited to complex political societies of modern times. In the United States for

23. Anson, Vol. I, p. 4.

example it is on the one hand divided within their respective spheres between the state authorities and the federal authorities and again the supreme legal sovereignty or the power to alter or amend the constitution is outside the constitution and is vested in the people as a whole or, as laid down in article *five* of the constitution, in one aggregate body represented by a majority of three-fourths of the State Legislatures,[24] at any time belonging to the Union. Thus abstract conception of sovereignty and its actual exercise are entirely different things.

Legal and Political Sovereignty.[25]—The absolute power of law-making, uncontrolled by any other authority or *legal* sovereignty is, in the English constitution vested in the British Parliament. The *political* sovereignty or the will which is *ultimately* obeyed by the citizens resides in the community, for Parliament can never go against the wishes of the community. The electors or the people is the political sovereign and Parliament is only the vehicle for expressing the wishes of the political sovereign. But courts will not recognise the wishes of the political sovereign unless and until they are adopted and given effect to by an Act of Parliament. In other words Parliament and Parliament alone is the sovereign in the legal sense of the term. Mr. Dicey points out that inspite of the passing of the Parliament Act of 1911 giving practical control of all important legislation to the House

24. Article 5 of the Constitution : "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or on the application of the legislature of two-thirds of the several states, shall call a convention for proposing amendments, which in either case, shall be valid, to all intents and purposes, as part of the constitution, when ratified by legislatures of *three-fourths* of the several states, or by conventions in three-fourths thereof, as the one or other mode of ratification may be proposed by the Congress; provided, etc."

25. See Dicey, pp. 70-73.

of Commons and inspite of the practice of non-interference by Parliament with the legislature of the Dominions, the legal sovereignty of the Empire still rests in the British Parliament, *i.e.*, in the House of Lords, House of Commons and the Crown acting together.[26] All the same the legal sovereignty of Parliament is subordinate, so to say, to the political sovereignty of the nation and the aim of all representative governments is to establish harmony between the legal and the political sovereign.

Government.—The aggregate of all persons who exercise any function of the state constitutes the Government of the state. They are the persons who evoke and direct the activities of the body politic, in other words " the agents through whom the state, as a corporate unity acts, moves and fulfils its end." [27]

Different branches of Government.—The legislature or the body which makes the laws, the executive which carries the laws into effect and the judiciary which interprets and enforces the laws are the different branches of the Government or the different organs of the state through which the sovereign powers are exercised. Of these the legislative is by far the most powerful and most important department of Government. It exercises large control over the activities of the other departments through its power of supply. " It is a sort of repository of all powers not conferred on the other departments ; it is in a sense the regulator of the administration." [28] In England with its Parliamentary executive or Cabinet system of Government and in the continental countries

26. See Dicey, Intro., *XXIV* and *XXIX* et seq.
27. Salmond's Jurisprudence (6th Edn.), pp. 110-111.
28. Garner, Introduction to Political Science, p. 425.

of Europe which have copied that system from England, the legislature is in a sense also the executive, for its agents, *viz.*, the cabinet, form the executive branch of the state.

Separation of the different organs of the state.—The separation of the different organs with their respective functions, legislative, judicial and executive is, we have seen, a modern development in politics.[29] The separation is more pronounced in federal states such as America and Switzerland than in other countries. In the United States, for instance, the constitution has not only defined the rights and spheres of action of the Central Government on the one hand and the individual States on the other, but also of the different organs, the legislative, judicial and executive, of the federal state, making them co-ordinate and independent authorities without the power of encroaching on one another's sphere of action. The powers of the President as head of the executive in America are defined and limited by the constitution and cannot be encroached upon either by the Congress or the Judiciary; so also with the Judiciary or the Federal Courts and with the Legislature or the Congress.[30] But this out and out separation of the different organs in the federal system of America has its drawbacks as well. Thus the President, who is the head of the executive but was intended to be independent of the Legislature of which he is not a member, cannot get any law passed except with the support of a majority in the Congress and to get their support he has to propitiate the dominant party; thus in fact he becomes a creature of the dominant party and has to carry out their policy. In

29. See *ante*.
30. See Dicey, p. 148.

practice, therefore, he is not outside the sphere of party politics. In the words of Mr. Bryce " America has reproduced the English system of executive Government by a party majority, reproduced it in a more extreme form, because in England the titular head of the state, in whose name administrative acts are done, stands in isolated dignity outside party politics." [31] The Judiciary again in America in their overzeal to uphold the constitution may at times misinterpret statutes passed by the Legislature.[32] Complete separation by water-tight compartments is neither possible nor desirable. On the contrary a judicious control of the different organs by each other, at any rate of the Executive by the Legislature and the Judiciary is more conducive to the establishment of rule of law. In England where there is parliamentary executive, the executive is under direct control of the legislature. In fact in England with its Parliamentary executive or Cabinet system of Government, the legislative and executive functions of the state are closely interwoven, as closely, says Bryce, as under absolute monarchies such as Imperial Rome or Russia under the Czars. The Cabinet as agents of the legislature or rather of the House of Commons constitute the executive; in other words the whole executive administration is in the legislature or the nation through the Cabinet. Again the initiation and carrying out of all important measures rest with the cabinet. There is thus no real separation of the legislature and the executive in the constitution of England.[32A] The executive is also under the

31. Bryce, American Commonwealth, quoted in Ridge's Const. Law, p. 18.

32. See Ch. and Asq., p. 4.

32A. There is still dualism in the constitution of England for the Legislature and Cabinet are not one and the same body; see *post* Ch XIV under " Ministerial Responsibility."

indirect control of the legislature in another way, *viz.*, through its power to grant or refuse supplies. "Not a penny can be spent in England except under some Act of Parliament, either a permanent Act or the Annual Appropriation Act." [33] Again, the Judiciary in England as also in America, through the writs of *habeas-corpus*, *mandamus*, etc., issued by the Superior Courts can check and correct illegalities by the executive and protect the liberties and rights of the subjects against any unjust invasion by the executive.[34] As regards control of the legislature by the judiciary, so far as the British Parliament is concerned which is a sovereign legislative body, whatever it enacts becomes law and no court can declare it to be *ultra vires*. So far as the House of Commons is individually concerned, it has been settled in the case of *Bradlaugh* v. *Gosset* [35] that the House has exclusive jurisdiction over internal management of procedure *within* its walls and even if it interpret law wrongly and pass a resolution which is illegal, to regulate its own proceedings within the House, courts have no jurisdiction to set it right or to interfere either directly or indirectly. It is like the decision of a judge who commits an error but against whose decision there is no appeal or revision. It is however otherwise if by a resolution of the House it attempts to alter the law so as to affect rights *outside* the House. Those whose rights are affected can then appeal to courts which will grant them relief. This was decided in the case of *Stockdale* v. *Hansard*.[36] A similar question arose

33. See Dicey, Ch. X.
34. See *post* Ch. XII "Summary of Proceedings against the Crown and the Executive."
35. (1884) 12 Q. B. D. 271. See *post* Ch. XVIII.
36. 9 A. D. and E. I. See *post* Ch. XVIII.

before the Calcutta High Court in the case of *Kumar Sankar Roy Chowdhury* v. *the Hon'ble H. E. A. Cotton.*[36A] It arose out of an application for an *ad interim* injunction on Mr. Cotton, President of the Bengal Legislative Council, restraining him from allowing a motion for additional grant for the salaries of the Ministers in a suit, brought by the plaintiffs in their representative character, for a declaration that the said motion was illegal and *ultra vires* being contrary to the provisions of Rule 39 and Rule 94 of the Bengal Council Rules and Standing orders. The contention of the plaintiffs was that as under R. 94 an estimate for additional grant could be presented only if the amount already voted was either insufficient or a need arose for some new service, and as the demand for the Ministers' salaries had been rejected *in toto* at the last session of the Council, the motion did not come under R. 94, and therefore, under R. 39, the motion could not be brought again in another session of the same Council. The learned judge, Mr. Justice C. C. Ghosh, gave effect to the contention and issued an *ad interim* injunction. It is rather unfortunate that the case of *Bradlaugh* v. *Gosset* which is exactly in point was not placed before his Lordship. Every Legislature whether sovereign or non-sovereign in every country has the right to regulate its own proceedings within the four corners of the Council chamber without any interference by the Judiciary ; it is one of the fundamental principles of constitutional law without which the Legislature cannot function at all. As Professor Morgan points out every political issue cannot be reduced to a *lis inter partes* and you cannot govern a country by Litigation. The learned judge distinguished the case of the British Parliament

36A. 40 Cal. L. J. 515.

by saying that it was a sovereign legislature whereas Indian legislatures are non-sovereign legislative bodies and therefore their proceeding could be questioned by the High Court. In non-sovereign legislatures it is only the *laws* passed by them when affecting rights can be questioned before courts which may declare them to be *ultra vires*. In the United States where the Legislature is a non-sovereign body, being a creature of the Constitution, the Judges of the Supreme Court cannot restrain the Congress in the discharge of its functions, although no doubt in proper cases they can declare laws passed by the Congress as *ultra vires*. The only difference between British Parliament which is a supreme or sovereign legislative body and Indian or other Legislatures which are non-sovereign, is that *laws* passed by the former cannot be declared *ultra vires* by courts whereas in the latter case they may be so declared. But so far as regulating its own procedure *within* the House or the Council Chamber and so long as such proceedings do not affect rights *outside* the House every legislature, sovereign or non-sovereign, has the undoubted privilege of conducting its proceedings without any intereference by courts. *In re Jatindra Mohan Sengupta* [36B] which had arisen out of a previous application for the issue of a writ of *mandamus* under Sec. 45 of the Sp. Rel. Act on Mr. Cotton to disallow the motion in regard to Ministers' salaries, the same learned judge after explaining the origin and nature of the writ of *mandamus*, had rejected the application as no *personal* injury to the applicant was threatened nor refusal of his request proved.

Constitution.—The term constitution is used in different senses. Besides its other meanings, it is used

36B. 40 C. L. J. 44.

to denote both the structure or organisation of a political society and the fundamental principles governing the body politic. Therefore in Politics, the essential or basal portion of the organisation or, the form, structure and also operation of a political society, *as distinguished from the details* of state structure and state action, is called the constitution of a state.[37] It may also be defined as a system of fundamental rules and principles for the government of a state defining the relations and powers of the different parts of the Government *inter se* and as between the Government and the Governed.

Constitutional law ; its province.—The province of Constitutional law is to enquire how the forces of the community are disposed, what are the legal rights and duties of the various parts of the sovereign body against one another and against the community at large and how the whole works together.[38] It embraces all rules which directly or indirectly affect the distribution or exercise of the sovereign power in the state and the relations which the component parts of the sovereign power bear towards each other and to the subject.[39] Thus Constitutional law, although in England is based more or less on private law,[39A] is a branch of public law and deals with the structure of the state and the rights and duties of the sovereign in general. The details appertain to administrative law which is but a subordinate branch of Constitutional law.

Classification of constitutions.—Constitutions may be classified in various ways, *e.g.*, federal and unitary,

37. See Salmond's Jurisprudence, p. 106; for other definitions see Ch. and Asq., pp. 2-3.

38. Anson, Vol. I, p. 23.

39. Dicey, p. 22; Hol., Vol. VI, p. 316.

39A. See *post.*

autocratic and democratic, unwritten, written and partly written and partly unwritten and so on ; but the most important classification is into *rigid* and *flexible*, terms invented by Mr. Bryce. *Rigid* Constitution means a constitution where the whole or part can be changed by only some extraordinary method of legislation, and *flexible*, where every part of it can be expanded, curtailed, amended or abolished by its ordinary legislature with as much ease and as freely as other laws.[40] In other words, rigid constitution is one in which certain laws known as fundamental laws cannot be changed in the same manner as ordinary laws, whereas flexible constitution is one under which every law of every description can be changed with the same ease and in the same manner by one and the same body.[41] Thus in the United States where the Constitution is rigid, the constitutional or fundamental laws cannot be altered by the Congress or the Federal Legislature consisting of the two Houses, the Senate and the House of Representatives, but by a special body represented by three-fourths of the legislatures of the different states ; in France where also the constitution is rigid, its fundamental laws can be altered by the National Assembly of the two Houses, the Senate and the Chamber of Deputies together, *i.e.*, by acting under the special procedure prescribed by the constitution.[41A] In most of the countries with federal constitution any amendment or alteration of the constitution if passed in both Houses of the legislature, is further submitted to the entire body of electorate in the several states for their acceptance or rejection. In England on the other hand, where the

40. See Dicey, p. 87.

41. Dicey, pp. 122-123.

41A. For different modes of amending the constitution in different countries see Whyte's "India, A Federation?" Ch. V.

constitution is flexible, the most vital laws affecting the Constitution, such as for instance, the Habeas Corpus Acts (1679 and 1816), the Reform Act (1832), the Parliament Act of 1911 or the Representation of the People Act of 1918 have been passed by its ordinary legislature, the Parliament, with the same procedure and with the same ease as it would pass or amend any ordinary law such as the Tramways Act or the Vaccination Act.

Characteristics of rigid and flexible constitutions. —In a *rigid* constitution (*a*) its legislature is a non-sovereign law-making body which must obey but cannot alter any fundamental law embodied in the constitutional document; (*b*) there is therefore a sharp and legal distinction between the fundamental or constitutional laws and other laws; (*c*) the laws passed by its legislature may be declared *ultra vires* if opposed to the constitutional laws; (*d*) the laws of the constitution are written and drawn up on a particular occasion; (*e*) the term "unconstitutional" has a definite and precise meaning, *viz.*, as being repugnant to the articles of the constitution; (*f*) the rights and liberties of the citizens are precisely defined in the constitutional document, in other words they follow from the constitution and (*g*) the constitution is symmetrical and more modern but difficult to change. In a *flexible* constitution, on the other hand, (*a*) its legislature is a sovereign law-making body uncontrolled by any written constitution or fundamental laws, which can pass, alter or repeal any constitutional law in the same manner and with the same procedure as its other laws; (*b*) no legal distinction between constitutional laws and other laws; (*c*) there is no authority, judicial or otherwise, which can declare laws passed by the legislature as *ultra vires*; (*d*) the constitutional laws and rules are mostly unwritten and grow up as occasion requires mostly through

the agency of judicial decisions; (*e*) the term "unconstitutional" means only that in the opinion of the speaker it is opposed to the spirit of the constitution; (*f*) the rights and liberties are not defined in any particular document; the individual rights do not follow from the constitution but that the constitution follows from and is based upon individual rights under common law; and (*g*) flexible constitution is more ancient and unsymmetrical but more convenient being readily capable of change, adapting itself to changing circumstances. In Ancient Rome and everywhere in Europe a century ago the constitutions were flexible as it is still to-day in England.[42]

Advantage and risk of a flexible constitution.—The adaptability to changed views and circumstances is the great advantage of a flexible constitution due to the absence of written fundamental laws defining the relations of government to the people. It prevents revolution by gradually altering the constitution as occasion requires by introducing and passing necessary legislative measures. But it has its drawbacks as well. The flexibility of the English constitution is said to be at once its glory and its danger. While on the one hand the greatest political changes can be brought about "in the guise of a legal reform" by means of a parliamentary enactment as was done by the Reform Act of 1832 and still more so by the Representation of the People Act of 1918, which made the constitution of England a real democracy, the flexibility of the constitution, on the other hand, places "the very constitution at the mercy of a momentary gust of Parliamentary opinion." "It is

42. See Bryce's Amer. Commonwealth, Vol. I, p. 264.

a nose of wax," said Francis Place,[42A] contemptuously, "which everyone twists to his purpose." The safeguard against any violent or abrupt change in the constitution lies in what is beautifully expressed by the poet in the lines quoted in the opening page of this book, *viz.*, "reverence for the laws"; in other words, in the conservative instincts of the race and its respect for traditions. The rigid constitution of the United States has its merits too. "It opposes obstacles to rash and hasty change. It secures time for deliberation..........It does still more than this. It forms the mind and temper of the people. It trains them to habits of legality. It strengthens their conservative instincts, their sense of the value of stability and permanence in political arrangements."[43] Written or rigid constitutions, as observed by an eminent American publicist, interpose effective bars of delay to the passions and prejudices of the people, in other words they "restrain the excesses of a transient majority."

Contrast between the Flexible Constitution of England and the Rigid Constitution of America.— In America the people's rights are secured by the written constitution which cannot be interfered with by the legislature; any such legislative interference will be declared unconstitutional by the courts. In England on the other hand although the people's rights are mostly based on common law and customs, they are liable to be interfered with by its legislature, the British Parliament, which is supreme and is the legal sovereign in the state. Thus the supremacy of the Parliament and the

42A. See Some Historical Principles of the Constitution by Kenneth Pickthorn, p. 13.

43. Bryce's Amer. Commonwealth, Vol. I, Ch. XXXV.

supremacy of the constitution are the two most marked characteristics in the flexible unitary and rigid federal constitutions of England and America respectively. In England as it was the king from whom the people apprehended invasion of their rights and liberties, the rules of English constitution mostly confine themselves to guarding against abuse of the powers of the executive. The American revolution on the contrary was a protest against a parliament as well as against a king, and its constitution therefore guards against the legislature as well as against the executive.

Sovereign and non-sovereign or subordinate legislative bodies.—All legislatures are not sovereign or supreme legislative bodies like the British Parliament capable of making or unmaking any law, constitutional or otherwise. It is this legislative sovereignty of the Parliament which gives the character of flexibility to the English constitution. In countries with written and rigid constitutions like the United States, France, Belgium, Switzerland, etc., the legislatures are non-sovereign or subordinate legislative bodies, subordinate to the Constitution to which they owe their existence and by which their powers are limited. They presuppose the existence of a separate body of fundamental laws. Laws passed by such legislatures if contrary to such fundamental laws or the laws of the Constitution are *ultra vires*.[44] In like manner the legislatures of the British colonies, even of the self-governing dominions like Canada, Australia, New Zealand or the Irish Free State, (whose legislatures though constituent assemblies, *i.e.*, possessing the power to alter their respective

44. In France, the courts would not declare such laws as *ultra vires*: see Dicey, pp. 130 and 153.

constitutions, and are thus within their own spheres sovereign bodies), are nevertheless non-sovereign legislative bodies because they owe their existence and constitution either to the Imperial Parliament or to the authority of the Crown under its prerogative, by which their powers are limited. Courts can therefore declare laws passed by the Colonial Parliaments, if repugnant to the authority of the Crown or to any imperial statute affecting the colony in question, as *ultra vires*.[45] The **British Indian legislatures** are likewise non-sovereign or subordinate law-making bodies without being constituent, and courts may declare Acts of the Indian legislature, Supreme or Provincial, as *ultra vires* if the legislature go beyond the powers limited by the Parliamentary statute creating such legislature.[45A] In *Secretary of State for India* v. *Moment*[46] it has been held that section 41 (*b*) of Act IV of 1898 (Burma Civil Courts Act) enacting that no civil court is to have jurisdiction to determine a claim to any right over land as against the Government, is *ultra vires* as being in contravention of section 65 of the Government of India Act of 1858[46A] (21 and 22 Vic. c. 106) which provided that there was to be the same remedy for the subject against the Government as there would have been against the East India Company. Now, the India Councils Act of 1861 (24 and 25 Vic. c 67) by section 22 empowered the Governor-General in Council in India to make, alter, amend, repeal laws and regulations for all places, persons, Courts of justice, etc., in British India, subject to certain limitations contained in

45. See Dicey, Ch. II. See *post*, Ch. XXIII, "Colonial Legislation."

45A. For some limitations of the Indian Legislature, see section 65 of the Government of India Act of 1919.

46. 40 I. A. 48.

46A. Now corresponds to sec. 32 of the Government of India Act.

the several provisos to that section. One of these limitations was that the Governor-General in Council was not to have the power of making any law or regulation which would repeal or in any way affect any of the provisions of the Government of India Act of 1858. In this case a suit was brought against the Secretary of State for damages for wrongful interference with the plaintiff's property in land and the Judicial Committee held that as such a suit would have lain against the E.I. Co., it was also maintainable against the Secretary of State and that the provisions of section 41 (*b*) of the Burma Civil Courts Act were *ultra vires*. When however **Indian Legislatures** act within the limits defined by the parliamentary statute their powers are plenary. It was so held in the case of *Empress* v. *Burah Sing*.[47] The facts of the case are briefly these. By section 9 of the Garo Hills Act (Act XXII of 1869), the Lieutenant-Governor of Bengal was empowered to extend the provisions of the Garo Hills Act to Khasi, Jaintia and Naga Hills, *i.e.*, by notification to withdraw those territories from the civil and criminal jurisdiction of the Calcutta High Court and vest such jurisdiction on such officer as the Lieutenant-Governor might direct. By a notification of 1871, the Lieutenant-Governor directed the Commissioner of Assam to exercise the powers of the High Court in regard to those territories. Thereafter Burah Sing and another who belonged to these parts were tried for and convicted of murder by the Deputy Commisioner of Assam and sentenced to be hanged and the sentence was commuted to one of transportation for life by the Chief Commissioner. Against the conviction and sentence the accused appealed to the Calcutta High Court. On

47. 3 Cal. 73 (F. B); on appeal, 4 Cal. 172 P.C., 5 I.A. 178

behalf of the Crown it was argued that the Calcutta High Court had no longer any jurisdiction to interfere. On behalf of the accused it was contended that section 9 of the Garo Hills Act which delegated powers of legislation to the Lieutenant-Governor was *ultra vires* inasmuch as the Governor-General's Council was itself an agent or delegate of the Imperial Parliament and could not again delegate its powers of legislation, on the principle of *delegatus non potest delegare*, and therefore the whole proceedings were illegal and void. The majority of the F. B. accepted the contention and set aside the conviction and sentence. On appeal by the Crown to the Privy Council, the judgment was reversed, the Judicial Committee holding that though the powers of the **Indian legislature** were limited by the India Councils Act of 1861 (24 and 25 Vic. c. 67), it was not a mere delegate or agent of the Parliament, but had, when acting within those limits, *plenary* powers of legislation as large and of the same nature as those of Parliament itself and could exercise such powers either absolutely or conditionally. The constitutional importance of this case is therefore twofold; *first*, that Indian Legislature being a subordinate law-making body, subject to the supreme authority of the Imperial Parliament and therefore subject to the limitations imposed by Parliamentary statute or statutes, Courts in India have jurisdiction to determine whether any particular Act or provision of any Act passed by that legislature is *ultra vires* by reason of being in excess of the powers conferred by the Parliamentary statute, and *secondly*, that when acting *within* the limits defined by such Parliamentary statute, the powers of the **Indian Legislature** are *plenary*. So again corporations, municipal bodies and the like with power to make bye-laws are other examples of non-sovereign law-making bodies but they are delegates in

the strict sense, of the legislature by which they are created and vested with such powers; such bye-laws may be declared *ultra vires* by courts when they exceed the limited powers of legislation delegated to them. Departments of Government when vested with powers to make rules and bye-laws, Courts of justice in regard to their power to frame rules of practice are other examples.

Parliamentary and Non-parliamentary executive. —The relation between the legislature and the executive affects materially the representative character of the Government of a country. The Government of a country where the executive is parliamentary is naturally more representative in character than where the executive is non-parliamentary. Parliamentary executive means that the legislature chooses the executive from amongst its own members and thus controls their appointment and dismissal; in other words, where the ministers are responsible to the parliament or the legislature. England, France, Belgium, Italy, the British self-governing colonies, etc., have parliamentary executive. In **India** the Government of India Act of 1919 has partially and in a considerably attenuated form introduced parliamentary executive in the Provincial councils under the system known as *dyarchy*.[48] Non-parliamentary executive is where the executive 'whether it be the emperor and his ministers or a president and his cabinet' is not appointed by the legislature. The United States, the German Empire (before war),[49] Switzerland, Sweden, etc., possess non-parliamentary executive. In England the *form* is non-parliamentary, for in theory, the king is the head of the executive and appoints the ministers,

48. See *post*, Ch. XXIV.

49. In the new German Republic the executive is partly parliamentary and partly non-parliamentary; see Arts. 53 and 54.

but *in fact* it is otherwise.[50] In America, the president is independent of the legislature and appoints the ministers who are responsible to him and not to the legislature. Each system has its merits and drawbacks. In countries with parliamentary executive the Government is more representative in character and by co-operation between the legislature and the executive conflicts between the two organs of the state are avoided but at the same time, parliamentary executive "shares the weaknesses inherent in the rule of an elective assembly."[51] Non-parliamentary executive on the other hand ensures strong administration from its comparative independence. The President of the United States, if he chooses, can go against the wishes of the Congress;[52] as a matter of fact, however, his powers being strictly limited by the Constitution, he cannot by the exercise of any arbitrary power do any illegal act; further, by the force of public opinion he is often obliged to act in concert with the Congress.

Federalism, what it means.[53]—Federalism is opposed to unitarianism and in the words of Professor Dicey means "the distribution of the force of the state among a number of co-ordinate bodies each originating in and controlled by the Constitution" whereas "unitarianism" is the concentration of the strength of the state in the hands of one visible sovereign power, be that power Parliament or Czar.[54] Federalism is the "union of several states without unity." It is the fusion of several states into a single state in regard to matters affecting common interest but separation and

50. See *post*, Ch. XIV.
51. Dicey, p. 484.
52. *Ibid*, Note III, Appendix.
53 To have a clear idea of the subject the student should read Chapter III from the valuable book of Professor Dicey.
54. Dicey, p. 153.

full independence of the constituent states in regard to other matters. It is the formation of a single nation in regard to matters of common interest without surrender of individual independence and autonomy in other matters. Thus " it is a combination of union and separation." If there were no separation but complete unity, then it would be unitary form of Government. Thus the Federal Constitution of the United States not only gives certain powers to Congress, as the national legislature, but recognises certain powers in the states, in virtue whereof their respective peoples have enacted fundamental state laws (the state constitutions) and have enabled their respective legislatures to pass state statutes. The United States is therefore itself a commonwealth as well as a federation of commonwealths each of which has its own constitution and laws.[55] In a federal system of Government the citizens of the individual or constituent states are also citizens of the union or the central or federal state; as citizens of the union they are subject to the federal law which is " the spoken will of the new community, the union." Federalism favours democracy while unitarianism favours autocracy, although a federal state need not necessarily be republican or democratic. The German Empire for instance before the war was federal though it was neither democratic nor republican.

Distinction between Federal States and Confederacies:[55A]—In a *Federal State* (*Bundesstaat*) there is fusion of the individual States into one Central or National State. The Central State acquires sovereignty by its own force, *i.e.*, from the will of the people as a whole and not by way of delegation from the constituent

55. Bryce's American Commonwealth, Vol. I, p. 270.
55A. See Willoughby's Public Law, T. L. L., 1923, Ch. XIII.

states. Although as a matter of fact the individual states seemingly continue to exist as before, juristically they are supposed to have divested themselves of their individual sovereignties, the old bodies politic to have dissolved and melted into the general body of the people who then create the federal constitution and recreate, as it were, the individual states. In this sense we must understand the words of President Lincoln "That the Union is older than any of the States, and in fact created them as States." "Thus the Federal State is created by the people as a whole and the individual States are creations of its will." While however by the amalgamation, a new independent political society with National citizenship [55B] is created, State citizenship is also recognised by the written constitution which also guarantees considerable independence and autonomy to the several States. Subject to the limitations laid down in the Constitution, each State can determine for itself its own form of government, interpret in its own way the written Constitution, make its own constitutional laws, pass its own private laws, claim its own citizenship and so on. In fact the several States stand to one another more as independent nations. This is the significance of Dicey's observation that in a Federal State there is union without unity. A *confederacy* (*Staatenbund*) on the other hand is really more like a league of independent states where the several states without parting with their individual sovereignties enter into a compact for certain common purposes, usually the purpose of common defence, entrusted to a common central government. In a confederacy there is no fusion, no formation of new political society with sovereignty, no divesting of indivi-

55B. See 14th Amendment of the American Constitution.

dual sovereignties. Withdrawal from the confederacy or refusal to obey the articles of the compact would therefore not be disobedience to a sovereign will and would not be juristically illegal, whereas secession from a Federal State would be illegal. In a Federal State there is double government, double allegiance, double citizenship and double patriotism, the Central Government claiming obedience *directly* of all citizens of all the component States in regard to all matters of federal or national concern. In a Confederacy the Central Government has no authority directly over the citizens of the different States but only on the States as individual units entering into the compact. In the words of Bryce " America is a Commonwealth of Commonwealths, a Republic of Republics, a State, which while one, is nevertheless composed of other 'states.' "

Conditions essential for the creation of a federal Government.—Conditions material or physical and moral which favour the growth of federal Government are : (*a*) a group of countries or states closely connected by contiguity, history, race, traditions and the like to give it a common nationality, and (*b*) the existence of the federal sentiment or a desire for union without unity,[56] in other words, strong local patriotism co-existing with a larger national patriotism. Thus there are generally speaking, separate states before there can be federation.[56A]

Aim of federalism.—The aim is to reconcile a common nationality with individual " state " rights

56. See Dicey. Ch. III.

56A. This is not universally true; for in the case of Mexico, Argentine and some other federal states, there were no independent separate states before the establishment of the Union.

effected by a *permanent* division between the spheres of the national or federal Government and of the several states. The permanent separation of the spheres and functions must necessarily be effected by a written and rigid Constitution beyond the power of either the federal or state legislatures to alter and which can only be altered by the people as a whole in whom therefore the legal sovereignty ultimately rests.[57]

Essential characteristics of (American) federalism.—The leading characteristics are : (1) *Supremacy of the constitution.* The American Constitution is an instrument of the people as a whole. No doubt it was adopted by the people assembling in conventions in their several states but it was done not as representing their respective states, *i.e.*, as delegates of those states but as an act of the people as a whole. As pointed out by Chief Justice Marshall,[57A] the greatest of America's judges, "It is true they assembled in their several states, and where else should they have assembled? But the measures they adopt do not, on that account, cease to be measures of the people themselves or become the measures of the state government. From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is ordained and established in the name of the people." From such a Constitution adopted by the people as a whole, the federal state derives its very existence just as an ordinary corporation derives its existence from the grant by which it is created. Every power, executive, judicial or legisla-

57. See Dicey, p 144 *et seq.*

57A. *M'Culloch* v *Maryland*, 4 Wheat , 404; see Sir Fred. Whyte's "India, A Federation?" p. 50.

tive whether appertaining to the central or the individual state is subordinate to and is controlled by the constitution. It is wholly unlike the system prevailing in unitary countries like England, where there is no written and rigid constitution or solemn declaration of the will of the people and therefore no law which is supreme controlling every other power in the state. Parliamentary sovereignty and a supreme constitution would be inconsistent and cannot co-exist.[58] In a federal system, supremacy of the constitution is essential to the very existence of the state. It ought to be noted however that in the constitution of the new German Republic which is federal, the federal legislature, *viz.*, the Reichstag, and not the Constitution, is supreme.[58A] The Reichstag cannot only override any state law but even the constitution of a state. In fact the new German constitution is somewhat midway between the purely federal constitution of the United States and the unitary constitution of England. "Strange as it may appear in the case of a federal state, the German constitution entirely adopts the British conception of the sovereignty of parliament."[59] The fact is under the German constitution not only political but also legal sovereignty resides in the people but as the legal sovereign is usually dormant and exercises its authority through the Reichstag the latter though not theoretically supreme is practically clothed with delegated sovereign authority.[60]

(2) *Division of authority* or distribution of the different powers of Government. The powers are dis-

58. See Dicey. p. 140 *et seq.*

58A. To a certain extent this is true also of the South African Constitutions, see Whyte's "India, A Federation?" p. 144.

59. The Const. of the Ger. Rep. by H. Oppenheimer, p. 25.

60. See *ibid*, p. 49.

tributed between the Central Government on the one hand and that the States on the other.[61] Subjects of national importance such as foreign and colonial relations, defence, with control of army and navy, coinage, banking, communications such as railways, posts, telegraphs, canals, etc., commerce, paper currency and such other matters are within the exclusive jurisdiction of the federal government. In regard to federal matters, this federal government exercise direct authority over all citizens of the Union but in regard to matters within the jurisdiction of the constituent states, the government of the state in question exercise direct authority only over its own citizens. In the United States or Switzerland, the principle of separation is further carried into effect by the Constitution defining strictly the rights and spheres of action of the different organs of state, the executive, legislative and judicial, making them coordinate and independent of one another. In England although the functions of the state are similarly distributed, they are all subject to parliamentary authority, to the "despotism of Parliament" as Professor Dicey puts it.[62]

(3) *Authority of the Judges.* The Judges are the interpreters of the constitution. They can not only determine the limits to the authority of the executive but also of the Central and the State Legislatures. They can declare Acts passed by the Congress or the State Legislatures as void if contrary to the articles of the constitution.[63] The Supreme Court of the United States

61. See *post*.
62. See Dicey, p. 148 *et seq.*
63. Not in all Federal Constitutions, *e.g.*, not in Switzerland (Bryce, Vol. I, p. 283) nor in the new German Republic (Oppenheimer, p. 25 and Ch. X).

has been placed on a footing of equality by the Constitution with the President and the Congress and as a final Court of appeal may declare any law passed by the Congress or the legislatures of the States as unconstitutional and therefore void. We will give an illustration quoted by Sir Frederick Whyte which is rather peculiar. The city of San Francisco, acting under a Californian statute, passed an ordinance that every male prisoner would have his hair short-clipped. A Chinese prisoner having been brought to the jail had his hair and pigtail cut off by order of the sheriff. The Chinaman thereafter brought a suit for damages against the sheriff and the court gave a judgment in his favour holding that the ordinance was *ultra vires* as it operated unequally and oppressively upon the Chinese and had been passed with a special view to the injury, the preservation of the queue being regarded by them as a matter of honour and religion, and as such the ordinance was in contravention of the 14th Amendment to the constitution.[63A] As a matter of practice however the Judges in the United States consistently refuse to pronounce on the validity of a law unless the question actually arises in a pending suit and the decision while conclusive in that case does not abrogate the condemned law.[64] Thus the limits placed by the Constitution on the powers of the executive and the legislatures make the judges as interpreters of the Constitution, arbiters between state and private rights, the latter being secured by the Constitution and not left at the mercy of the legislature as in England.

63A. See Whyte's " India, A Federation? " p. 79.

64. See Const. of the German Republic by Heinrich Oppenheimer, p. 25.

(4) *Fusion* of the constituent communities into a single state or one independent political society in regard to matters affecting common interest. But although national citizenship is created, state citizenship is continued under the Constitution, and there is thus double citizenship. The citizen of one state is not citizen of another state although by the Constitution "he is entitled to all the privileges and immunities of citizens of all the other states," and he would be a citizen of the Union or the Federal State.

(5) The Federal state possesses a *federal law* which is not law agreed to by the constituent communities but is " the spoken will of the new community, the Union."

(6) *New conception of sovereignty*. The Tenth Amendment of the American Constitution declares the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." Thus the federal authorities are supreme in certain spheres of action but in others the constituent communities act with the full autonomy of independent states. The powers of the individual states are independent, neither given nor subject to be taken away, by the Government of the Union.[65] The Federal Government has no power to interfere with legislation by the states [66] or with their executive or administrative functions.

Drawbacks of the federal system.[67]—(1) Federal Government is comparatively weaker than unitary Government owing to the distribution of powers of the state

65. Wilson's State, p. 545.

66. In the new German Federal Republic, it is otherwise, as federal law can override state law; see Art. 13.

67. Dicey, p. 167 *et seq*. See also Willoughby's Public Law (Tagore L. L., 1923), p. 218 *et seq*.

among a number of co-ordinate bodies instead of being centered in the hands of a single authority.

(2) It tends to produce conservatism owing to the rigidity of its constitution.

(3) Predominance of the judiciary or extreme legalism. The judges as interpreters of the Constitution determine the limits to the authority of the executive and the legislatures. Of course the Judges cannot restrain either the Congress or the President in the discharge of their respective functions but " their acts when performed are, in proper cases, subject to the cognizance of the judiciary." Under the American system, litigation often takes the place of legislation. In England also there is legalism owing to the supremacy of law but not in that sense or in that extreme form as in America where judges can declare even Acts of the legislature as *ultra vires*. In France on the contrary there is entire absence of legalism, so to say, owing to its *droit administratif* system, and the reluctance of the French people to allow Courts of Justice to interfere in matters of administration; the courts are powerless to correct even the illegalities of the executive whilst discharging official duties; nor can they declare laws passed by its legislature as *ultra vires*.

(4) It is more expensive and more complicated. Bryce mentions[68] the following as the charges usually brought against federal Governments: (1) Weakness in the conduct of foreign affairs. (2) Weakness in Home Government, *i.e.*, deficient authority over the component states and the individual citizens. (3) Liability to dissolution by the secession or rebellion of states. (4)

68. The American Commonwealth, Vol. I, Ch. XXIX.

Liability to division into groups and factions by the formation of separate combinations of the component states. (5) Want of uniformity among the states in legislations and administrations.[68A] (6) Trouble, expense and delay due to the complexity of a double system of legislation and administration.[68B] Complications arising out of a double system of Government often perplex the citizens and place them in a position of dilemma. In a case of conflict between the Federal and the State authorities, legislative, judicial or executive, the citizens at times find it difficult to decide whom to obey. The complication is further increased by reason of the Congress and the State Legislatures possessing concurrent jurisdiction to legislate in regard to many matters.

Advantage of federalism.—The greatest and perhaps the only advantage of Federalism is that while on the one hand, it secures national strength and security by the creation of a common citizenship of the Union, on the other, it gives fuller play to the spirit of local patriotism and affords greater opportunities for the exercise of autonomy and rights of self-government.

Examples of federal states with their modes of division of powers.[69]—The United States, the Swiss Confederation, the Dominion of Canada, the Commonwealth of Australia and the South African Union are

68A. Thus legal instruments such as wills, deeds, etc., may be valid in one state out invalid in another; common law and statute law may be differently interpreted in different states; a child may be legitimate in one state and illegitimate in another; a woman may be regarded as married in one and unmarried in another and so on.

68B. For instance, in regard to serving notices of judicial proceedings, compelling attendance of witnesses, execution of personal decrees, in regard to extradition proceedings, etc.; see Willoughby, p. 219.

69. See Dicey, Appendix, Note II. See also "India, A Federation?" by Sir Frederick Whyte.

some of the examples where the federal system of Government prevails. The Constitutions of these countries however provide for the division of powers between the Federal Government and the Government of the constituent States or Provinces in different ways. In some the powers of the central government are strictly limited leaving all residuary powers in the individual states and in others, it is the other way. Thus in the United States the powers conferred by the Constitution on the Federal or Central Government are definite, *i.e.*, strictly defined, leaving those of the States undefined;[69A] so also in Switzerland and Australia. In Canada on the other hand, the powers of the Provinces are strictly defined while those of the Central Government are left undefined. According as larger or smaller powers are left in the central government the federal states may be said to approximate more or less an unitary form of government. Thus in South Africa where the component states have surrendered most of their powers to the Central authority, the government is really more unitary than federal. In South Africa it is the Parliament and not the Constitution which is supreme. For other examples of federal Government, may be cited the German Empire before the war, the present German Republic, Soviet Russia, and Mexico, Venezuela and Argentina in South America.[70]

Is federalism desirable for the British Empire.— There are people who advocate imperial federalism or a federal constitution for the whole British Empire or at any rate for the United Kingdom and the Dominions.

69A. See the Tenth Amendment which however has been judicially interpreted by Chief Justice Marshall in the case of M'Culloch *v.* The State of Maryland (4 Wheat. 316) in such a way as to import what is called "the doctrine of implied powers" and thereby largely increase the powers of the Federal State. See Sir Fred. Whyte, p. 74.

70. See Schuyler's Constitution of the United States, pp. 43-44.

Professor Dicey is of opinion that it is extremely doubtful if it would be at all desirable. It is not necessary he says for the unity of the Empire which can be maintained by Conferences of premiers giving opportunities for exchange of views and for settlement of imperial and other important questions. The introduction of federalism would on the contrary give birth to a feeling of divided allegiance making it difficult to reconcile State rights with the control by a Central power.[71] In the Imperial Conference of 1917 the question was very fully discussed and the idea was not very favourably entertained by the Dominion premiers chiefly on the ground that it would interfere with the autonomous rights of the Dominions.

English Constitutional Law really part of private law.[72]—Although constitutional law is a branch of public law dealing with rules which regulate the distribution and exercise of sovereign power, in England there is no separate written constitutional law. The English constitutional law has been evolved out of, and is therefore a part and parcel of, the private law or general law of the land. The principles of private law when applied by courts to determine the relation between the state and individuals become principles of constitutional law. No sharp distinction can be drawn between ordinary criminal law which is private law and constitutional law. Treason and sedition so far as they affect allegiance to the sovereign or the state are part of constitutional law. Other crimes, felony and misdemeanour as being offences against the state become in a sense part of constitutional law. To take another example. The right of personal

71. See Dicey, Introduction.

72. See *post*, Ch. III, under "Constitution based on individual rights."

freedom which is admittedly a principle of constitutional law and is one of the 'fundamental' rights embodied in the written Constitution of other countries is nothing more than, as pointed out by Dicey, the right of A not to be assaulted or imprisoned by B or the right of A to bring an action against B or to prosecute B if he is so assaulted or imprisoned. So with the right of discussion, right of public meeting and other rights against the state. Even martial law so far as it is recognised by the English constitution is part of the general right and duty of every citizen to put down breaches of the peace, riots, insurrection, etc., in other words, to resist force by force.[73]

Droit administratif of France and other continental countries.[74]—*Droit Administratif* or administrative law of France is that branch of French law which deals with (1) the position and liabilities of all state officials; (2) the civil rights and liabilities of citizens in their dealings with the officials as representatives of the state; and (3) the procedure by which these rights and liabilities are enforced.[75] Rule of law which prevails in England and America admits of no differential treatment of officials when committing illegal acts in discharging public duties whereas administrative law protects public servants in such cases from the jurisdiction of ordinary law and ordinary courts. The state shoulders the liability and the aggrieved party gets his redress from the state and the official, committing the wrong, is not made personally liable as in England or America unless the wrong is committed in his personal capacity and not as an official in the discharge of public duties. The matter

73. See Dicey, pp. 281-282. See *post*, Ch. XVI, "Martial Law."

74. See Dicey, Ch. XII; see *post*, Ch. III, "Contrast between Rule of Law and *Droit Administratif*." And Ch. XIV, Absence of *Droit Administratif* in English Constitution.

75. Dicey, p. 329.

is adjudged not by ordinary courts but by special tribunals known as *administrative courts* under special procedure and special law. Thus equality of status which is the first characteristic of rule of law is absent where administrative systems prevail. *Droit administratif* of France and other countries where it prevails is primarily based upon the idea that state rights are superior to individual rights. In France there is further the traditional jealousy of the French people of interference by ordinary law courts with the administrative acts of Government.[76] The chief characteristics of the French administrative law are : (1) Protection of officials against illegal acts in discharge of official duties. (2) Rights of state as against private citizens are determined by special rules. (3) Absence of jurisdiction of ordinary courts in regard to administrative matters. (4) In case of conflict between the jurisdiction of ordinary courts and administrative courts, the decision rests with the Council of State (*conseil d', etat*). (5) The executive can prevent beforehand the commission of crimes which cannot be done in England or America where under the rule of law criminals can only be punished on due trial after the crimes are committed. The system that prevailed in England under the Tudor and Stuart kings in the 16th and 17th centuries supported by the theory of Bacon and others that "prerogative was something beyond and above law" gave large discretionary powers to the executive, powers which could not be questioned in courts of law and were enforced by the Star Chamber and the Privy Council. Such a system resembled to a large extent *droit administratif* of France and Continental Countries.[77] Under modern English constitution however there is nothing

76. See Dicey, Ch. XII.
77. See Dicey, p. 366.

akin to it, for now in England, as soon as officials commit any wrong or overstep the powers vested in them by statutes in the discharge of public duties, they become personally liable under ordinary law and before ordinary courts. "Never let us be tempted," says the Lord Chief Justice of England,[77] "to sacrifice that heritage (rule of law), or to entertain, or to connive at, or even to coquette with alien notions of what was called administrative law which......cherished the fallacy that the executive was somehow to be independent of the judges." It should however be noticed that owing to complexities and exigencies of modern society it becomes necessary at times even in England, a practice deplored by Professor Dicey, to authorize an administrative body to make regulations to carry out the objects of a Statute instead of setting out all the details in the Act itself. It would however be a mistake to suppose that under the present *droit administratif* system of France, the executive can act quite arbitrarily according to their sweet will and pleasure. In France the Council of State has developed from a purely Government department into a quasi-judicial tribunal as in the case of the Judicial Committee of the Privy Council in England; and, like common law or the law of equity, administrative law in France is now mainly based on case law, the decisions of the *conseil d' etat*, and the executive is governed by such administrative law.[78] In France the Legislature often delegates its powers of legislation to the executive and in pursuance to this delegated authority the President issues ordinances. The Council of State has the power to annul these ordinances and administrative orders if they are *ultra vires*. In this way also the Council of

77A. At the Centenary of the Law Society for 1925.
78. See Dicey, p. 371 *et seq.*

State acts as a great check on the arbitrary exercise of power by the executive.

Administrative law, its different meanings.—We have just seen that the expression administrative law is used in France and on the Continent in the sense of *droit administratif* or the body of rules regarding the rights and liabilities of state officials and the procedure for enforcing them. The term administrative law is however more commonly used to denote the rules which govern the exercise of executive functions by Government servants or by individual departments of the executive. In this sense administration is to the constitution what function is to structure. Constitution, says Luigi Miraglia, is to administration what structure is to function.[79] Of the different organs of the state it is the executive which through its different departments and servants carries on the actual active work of administration affecting the rights of the citizens. The rules which regulate the conduct of the executive is called administrative law. The *general* principles and rules which regulate the exercise of the sovereign power in a state would fall under Constitutional Law, whereas the *details* of governmental activity would be part of administrative law. As observed by Professor Maitland it is very hard to draw the line between Constitutional Law and Administrative Law.

Comparison of English, American and French Constitutions.—

(A) *English*—(1) limited monarchy, (2) flexible constitution, (3) unitary, (4) Legislature, a sovereign law-making body, *i.e.*, Supremacy of Parliament, (5) rule of law; officials and non-officials all subject to same laws and same tribunals; absence of *droit administratif*,

79. See Ghose's Com. Adm. Law, p. 89.

(6) Parliamentary executive and cabinet form of Government; the executive not only controlled by, but really part of the legislature, (7) supreme executive (sovereign) nominal head, the real head being the prime minister, (8) ministerial responsibility for the acts of the supreme executive who personally is irresponsible, (9) administrative integration or control of the administration, central and local, by the cabinet as a whole, only partial, (10) co-operation between the executive and the legislature in regard to money appropriations for administration, (11) citizens' rights based on common law and not any written constitution, (12) judiciary can protect citizens' rights against the executive but not against the legislature, (13) Legislature, the final arbiter of citizens' rights, (14) individual rights not subordinated to state rights.

(B) *American*—(1) republican, (2) rigid and written constitution, (3) Federal, the United States being a federation of Commonwealths each possessing its own Constitution and laws together with a Federal or National Government with separate legislature (Congress), judiciary (Federal courts) and executive (President as head of the federal executive), (4) Legislature (Congress) a non-sovereign legislative body; supremacy of the Constitution, which has delegated certain definite legislative powers to the Congress, (5) rule of law and absence of *droit administratif*, (6) non-parliamentary executive; the executive (ministers) subordinate to the President by whom they are appointed and whom they are bound to obey and are wholly independent of the legislature. (7) Supreme executive (President) real head of the executive enjoying (limited) irresponsibility, can veto any bill passed by the two Houses, which can be law

80. Art. I, Ch. 7 of the Amer. Cons.

only if again passed after reconsideration by a majority of two-thirds of each House. (8) No ministerial responsibility for the acts of the supreme executive (President). (9) No cabinet system and no administrative integration. In America, says Bryce, the administration does not work as a whole. "It consists of a group of persons, each individually answerable to the President but with no joint policy, no collective responsibility." (10) No co-operation between the executive and the legislature in regard to money appropriations. (11) Citizens' rights based on written Constitution. (12) Judiciary protect citizens' rights not only against the executive but also against the legislature. (13) The federal courts with the Supreme Federal Court at Washington, the final interpreter, and therefore arbiter of citizens' rights. (14) Individual rights not subordinated to state rights, the state existing for the individual. In the United States, the Federal Legislature is called the Congress which consist of two Houses, the Senate and the House of Representatives. The Senate is composed of two senators from each of the forty-eight states, elected by the people for a term of six years. The House of Representatives consist of members elected for ten years, the number of Representatives for each state being proportionate to its population. There are 96 Senators and 435 Representatives. The President is not a member of the Legislature but possesses the power of veto which may be overcome by two-thirds votes of each House. The President is elected by an independent body of electors. A number of electors, equal to the number of Senators and Representatives that each State is entitled to send to the Congress, are appointed in each State by popular ballot. These electors meet in their several States and give their votes separately for a President who

is elected for four years.[80A] The President is the Commander-in-chief of the Army, Navy and the Militia of the Union. The Vice-President is *ex-officio* President of the Senate and in case of death or resignation of the President, becomes the President for the rest of the term.

(C) *French*—(1) Republican. (2) Written and rigid constitution. (3) Unitary. (4) Legislature (National Assembly, consisting of a Senate and a Chamber of Deputies), a non-sovereign law-making body; supremacy of the constitution. But the laws passed by the legislature if contrary to the Constitution, cannot be declared *ultra vires* by courts as in the United States and therefore the articles of the Constitution, says Dicey, are not laws in the strict sense of the term but more like *maxims* of political morality or constitutional understandings safeguarded not by courts but by public opinion and political sentiment. (5) *Droit administratif;* and therefore, absence of rule of law. (6) Parliamentary executive and cabinet form of Government. As in England the ministers are chosen from the majority party in the chambers. (7) Supreme executive (President) nominal head, enjoying (limited) irresponsibility. (8) Ministerial responsibility for the acts of the President; all acts and orders of the French President having to be countersigned by some ministers as in England. For this reason it is said the President of France " neither reigns, nor governs." (9) Cabinet system of Government and complete administrative integration or centralization of administration. (10) No co-operation between the executive and the legislature in regard to money appropriation. (11) Citizens' rights based on written Constitution. (12) Judiciary cannot

80A. Now-a-days, there is a practical elimination of the Electoral College in the election of the President.

protect citizens' rights either against the executive which is invested with large discretionary power or against legislature. (13) Legislature interprets the constitution (and not courts). (14) State rights superior to individual rights. In France the Legislature is called the National Assembly consisting of two Houses, the Senate with 300 members elected by indirect vote for nine years and the Chamber of Deputies with 597 members elected by direct vote for four years. The President, who is the head of the Republic, is elected for seven years by the National Assembly of the two Houses.

Unconstitutional law, its meaning.—The expression unconstitutional law conveys different ideas in different states according as their constitutions are rigid or flexible and according as courts can declare them to be void or not. As applied to an Act of the American Congress it would mean that the Act is altogether void being beyond the powers of that legislature as defined by the Constitution. When referred to an Act of the British Parliament it does not and cannot mean that the Act is void or illegal, for whatever measure the British Parliament passes with its supreme legal sovereignty is legal and valid and no court can declare it to be *ultra vires*. The expression in such a case has therefore no definite meaning save and except that the Act, in the opinion of the speaker, is opposed to the spirit and principles and traditions of English constitution. As applied to an Act of the French Parliament, it does not mean that it is void, for no French court would declare it to be so even if it is contrary to the articles of the Constitution but simply that it is opposed to those articles. The articles of the Constitution of France are therefore strictly speaking not laws, but more like maxims of political morality.[81]

81. See Dicey, p. 130, and Appendix, Note VII.

CHAPTER II.

SOURCES OF ENGLISH CONSTITUTIONAL LAW.

What is meant by the constitutional law of England.—It means all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state.

Where English constitutional law is not to be found.—It is not to be found in any authoritative document as in the case of countries with written rigid Constitutions like France, the United States, Belgium and most other countries. It is for this reason that foreign jurists like de Tocquaville say that English constitution has no real existence, or that English constitutional law is no law at all but only " a cross between history and custom." These sayings are not strictly accurate for English constitution, though unwritten, and English constitutional law do exist and within English constitutional law are rules which are laws in the strictest sense of the term being equally enforceable by courts.

English constitution and constitutional law, where to be found.—" The constitution must be found," says Sir William Anson, " by those who seek it, in statutes, in judicial decisions, in custom, in convention; it is set forth in text books; it may be learned in its important features by the observation of the course and conduct of politics; but in authoritative documentary form it is not to be found."[1] English constitutional laws are

1. Anson, Vol. I, p. 6.

therefore to be gathered from various sources; English constitution is a product of gradual development; " it has grown and not made at one stroke," is still growing and will go on growing in future through the development of new customs and conventions and the passing of new Parliament Statutes. In fact English constitution has been compared to a living coral reef which is changing imperceptibly every moment but in which the alterations become noticeable or conspicuous only after a time.

What is English constitutional law made up of.—English constitutional law is made up of (*a*) laws proper and (*b*) conventions, the latter forming the bulk.

Distinction between constitutional laws proper and constitutional conventions.—*Laws proper* are rules which can be enforced by courts. They may be either written, *i.e.*, enacted by Statute, or unwritten, derived from Common Law, *i.e.*, from custom, tradition or judge-made maxims. But whether written or unwritten, whether to be found in statutes or in common law maxims and judicial decisions, they are equally enforceable in courts. Thus, the rule of constitutional law that " the Crown cannot dispense with the obligation to obey a law " is a *written* constitutional law being embodied in the Bill of Rights, whereas the maxim " the king can do no wrong [2] or the constitutional rule " that some person is responsible for every act done by the Crown, *i.e.*, the doctrine of ministerial responsibility [3] is each an example of *unwritten* English constitutional law proper being equally enforceable in courts.[4] *Constitutional*

2. See *post*, Ch. XI.
3. See *post*, Ch. XII and Ch. XIV.
4. See Dicey, p. 24.

conventions on the other hand are unwritten rules of conduct, or a body of political ethics as sacred as laws proper but not enforceable by courts. They are based on and comprise " practices, precedents and usages which have been found from experience to be essential for the harmonious co-operation of the Crown, the Lords and the Commons in whom the executive and legislative functions of Government are vested." [5] Thus the rules that the king cannot veto any bill passed by the two Houses, that a Bill must be read three times before being passed and so on, are constitutional conventions.

Sources of English constitutional laws proper.[6]—The sources are (1) *Statutes, e.g.*, the Habeas Corpus Acts of 1679 and 1816, the Parliament Act of 1911, the Representation of the People Act of 1918, etc. Parliament being a sovereign legislative body can make and unmake any law including those which are known as constitutional laws of England. (2) *Quasi-statutes or the charters;* they are the great constitutional landmarks which are in the nature of solemn compacts between the sovereign and the people regulating the relations between the Crown and the people but which really do not lay down any new law but only embody and emphasise principles of common law. The provisions of these Charters are " for the most part declarations of what the existing law was, *not enactments of any new law*. They set forth and assert the right of the subject, according to what was assumed to be the ancient unwritten laws and constitution of the realm." The sovereign would often encroach upon the common law rights of the people in the name of so-called royal prerogative, and these Charters

5. See Hal., Vol. VI, p. 317.
6. See Ridges' Cons. Law, pp. 2-3,

only defined the limits to the exercise of such prerogative.[6A] They are (*a*) the Magna Carta (1215), (*b*) the Petition of Rights (1628, 3 Car. I, c. 1), (*c*) the Bill of Rights (1688, 1 Will. and Mar. S. 2, c. 2), and (*d*) the Act of Settlement (1700, 12 and 13 Will. III, c. 2). (3) *Common Law* or immemorial customs. Royal prerogatives being the rights and privileges of the Crown allowed by common law fall under this head. (4) *Treaties and Quasi-treaties* such as the Acts of Union with Scotland and Ireland. (5) *Judicial decisions*, such as *Howell's case* [7] establishing immunity of judges, *Bushell's case* [8] establishing independence of juries, *Sommersett's case* [9] establishing absence of slavery in English soil, the case of *Stockdale* v. *Hansard* [10] defining the limits of the privilege of the House of Commons, and hundreds of other cases. The general principles of the constitution such as the right to personal liberty, the right of public meeting and so on are mostly the results of judicial decisions based on principles of common law. English constitution as observed by Professor Dicey is not so much the result of legislation as of judicial decisions; it is essentially a judge-made constitution.[11]

Important provisions of the four great charters.[12]—(1) *The Magna Carta.*—On the 15th of June, 1215, the Barons met King John at Runnymede and extorted from him his seal to the sixty-three articles drawn up by them as a settlement of the grievances which the

6A. See *post*, Ch. XI, "Statutory limitations of the prerogative."
7. *Hammond* v. *Howell*, 2 Mod. 219 (1678).
8. 6 St. Tr. 999 (1670).
9. 20 St. Tr. 1-81 (1771-72).
10. 9 A. and E. 1 (1839).
11. See Dicey, pp. 191-192.
12. See Ridges' Cons. Law, pp. 6-11.

nation as a whole had against the king. Of these the most important provisions are :—(*a*) Administration of justice should no longer be made a source of gain to the Crown. " To no man will we sell, to no man will we deny or delay, right or justice."

(*b*) No man to be punished without due trial. " No free man shall be taken, or imprisoned, disseised, or out-lawed, or exiled, or in any way destroyed, save by the lawful judgment of his peers or in due process of law."

(*c*) The Common Pleas were not to follow the king's court, but were to be held in a fixed spot.

(*d*) Fines to be regulated according to the nature of the offence.

(*e*) The king not to abuse his feudal rights. No tenant-in-chief to be called upon for more than the regular service, on the death of the tenant, the heir to enter upon his possession on payment of the customary relief, etc.

(*f*) No scutage [12A] or aid [12B] to be levied without the consent of the *commune concilium* (Parliament) except the three customary feudal aids—to ransom the king's person, to marry his eldest daughter, and to make his eldest son a knight.

(*g*) For assessing aids and scutages the consent to be taken of the *commune concilium* consisting of the (*i*) Archbishops, bishops, abbots, earls, and greater barons to be summoned singly by letters addressed to each and

12A. Tax paid by tenants to their lord for exemption from military service. Literally means shield-money.

12B. Under the feudal system the king was the supreme Landlord of the whole country. Those who held land directly under the king were called tenants-in-chief, who not only had to render certain feudal service to the king but to make certain payments. These payments were known as *aids*.

of (*ii*) tenants-in-chief summoned by a general writ addressed to the sheriff.

(*h*) In time of peace all merchants were free to come to, stay in, or to leave England without extortion.

Confirmation of the charter.—Edward I confirmed the charter on 5th of Nov. 1297, and in fact, the Great Charter was confirmed by more than thirty different Statutes prior to the time of King Henry VI.

(2) *Petition of Right*, 1628 (3 Car. I, c. 1).—Charles I in order to carry on war with France and having failed to obtain money from Parliament raised a forced loan. Sir Charles Darnel and four other knights who had refused to pay were committed by a warrant signed by the Attorney General stating that they were committed by special command of His Majesty. On application for writ of *habeas corpus*, it was held royal command was sufficient ground for arrest and detention.[13] This caused great dissatisfaction and there was a conference between the two Houses resulting in the famous Petition of Right which was presented to the king, to which the king at last assented. The prayers or the clauses are (*a*) No man should be compelled to make or yield any gift, loan, benevolence or tax except by an Act of Parliament.[14]

(*b*) No free man should be forejudged of life or limb or imprisoned or detained against the form of the great Charter and the law of the land.

(*c*) Billeting of soldiers on people to be discontinued and (*d*) That commissions should not be issued to try civilians by martial law as is used by armies in time of war.

13. See Darnel's case (Five Knights' case), 3 St. Tr. 1 (1627). See *post*, Ch. XI.

14. See Five Knights' Case, 3 St. Tr. 1.

(3) *The Bill of Rights*, 1688 (1 Will. and Mar., secs. 2, c. 2).—As the *Five Knights' case* [15] was one of the immediate causes which led to the passing of the Petition of Right in the reign of Charles I, so the *Seven Bishops' case* [16] illustrated one of the many illegalities committed by the Stuarts in the name of royal prerogative which led to the Revolution of 1688 and invitation of William Prince of Orange, son-in-law of James II. William came, James fled and abdicated the throne, a convention was summoned by William and Mary and the Convention was turned into a Parliament which passed the Bill of Rights. This important charter though not a written Constitution is the nearest approach says Anson to a constitutional code which England possesses. It not only summarises many important constitutional rules but incidentally settles also some important disputed questions of principle such as whether the king has an indefeasible hereditary right to the throne. Its provisions are—(*a*) That the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal.[17]

(*b*) That the pretended power of dispensing with laws or the execution of laws as it hath been assumed and exercised of late is illegal.

(*c*) That the Commission for erecting the late Court of Commissioners for ecclesiastical courts, and all other Commissions and Courts of like nature, are illegal and pernicious.

(*d*) That levying of money for or to the use of the Crown by pretence of prerogative without grant of

15. 3 St. Tr. 1. See *post*, Ch. XI.

16. 12 St. Tr. 183. See *post*, Ch. III, "obstacles to Parliamentary sovereignty in former times."

17. The question was raised in the *Seven Bishops' case*, 12 St. Tr. 183.

Parliament for longer time or in other manner than the same is or shall be granted is illegal.[18]

(*e*) That it is the right of the subject to petition the king and all commitments and prosecutions for such petitioning are illegal.[19]

(*f*) That the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law.

(*g*) That the election of members of Parliament ought to be free.[20]

(*h*) That freedom of speech and debates, or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

(*i*) Excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(*j*) That jurors ought to be duly impanelled and returned.

(*k*) That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

(*l*) That for redress of all grievances and for amending, strengthening, and preserving of laws, Parliaments ought to be held frequently.

(*m*) That no dispensation by *non obstante* to any statute or part thereof should in future be allowed, except in so far as permitted by statute.

18. In *Bates' case* (the case of Impositions), 2 St. Tr. 371 additional impost was held to be legal as being under king's absolute power (*salus populi*) and in *Hampden's case* (the case of shipmoney), 3 St. Tr. 825, imposition of a new tax was also held to be legal by a majority of the Judges, for defence of the realm.

19. In the *Seven Bishops' case*, 12 St. Tr. 183, the Bishops were charged with seditious libel for petitioning the king. The Jury returned a verdict of not guilty.

20. See Anson, Vol. I, p. 342 *et seq.*

(4) *The Act of Settlement*, 1700 (12 and 13 Will. III, c. 2).—This Act was mainly intended for settling succession to the Crown when in 1700, Mary had died, William was dying and Anne of Denmark was past the age of child-bearing. The Act therefore declared that in default of the issue of William III and of Anne, Princess Sophia, Duchess of Hanover, was to be next in succession with limitation to the heirs of her body. There were other conditions that the sovereign was to be a member of the Church of England, not to marry a papist, etc.[21] Other important provisions of the Act are: (*a*) That no pardon under the great seal is to be a bar to impeachment by the Commons in Parliament and (*b*) The Judges (of the Supreme Court) to hold office during good behaviour (for life) but removable upon an address to the Crown by both Houses of Parliament.

Constitutional conventions: their nature.[22]—We have seen that the constitutional conventions are not laws in the strict sense of the term in as much as they cannot be enforced by courts. Supposing the convention that a bill has to be read three times in each House before it is passed is violated and a bill is passed in the House of Commons after being read only twice. No court will admit any evidence to show that it was read only twice or refuse to enforce such law on that ground; or suppose the convention that a bill passed by both the Houses of Parliament should not be vetoed by the sovereign is ignored and the Crown vetoes such a bill; no court will enforce the bill as if it were duly passed on the ground that it was wrongly vetoed contrary to convention. To take another instance: suppose a ministry do not resign inspite of a direct vote of censure

21. See *post*, Ch. X, under "Crown," Subhead "Title to the Crown."
22. See Dicey, Ch. XIV.

being carried. There is no remedy to enforce the convention by injunction or other legal process. Conventions though not laws but only a body of political ethics, are nevertheless as sacred and as much respected as laws proper. Now, conventions are for the most part connected with Parliament. In fact the Cabinet with its system of Party Government is itself an out-growth of conventions. The whole aim and object of the conventions is to ensure that the Government is carried on according to the will of the nation in whom the *political* sovereignty of the state is vested; in other words, *to maintain the sovereignty of the people*. Parliament which is the *legal* sovereign consists of the Crown, the House of Lords and the House of Commons, the last representing the nation or the political sovereign. The object of conventions being to give effect to the will of the nation, the three branches of the legislature must so act as to ensure the supremacy of the House of Commons. Again the king as the head of the executive represented by his Ministers must act in such a way, so far as his arbitrary discretionary powers or prerogatives are concerned, as to give effect to the will of the nation. Thus with the exception of the few limited examples where the privileges of the two Houses of Parliament are concerned,[23] conventions are rules for the exercise of the sovereign's parliamentary and other political prerogatives. Dicey accordingly defines conventions as "regulations in reference to the exercise of the prerogative," *i.e.*, they are (mostly) "rules for determining the mode in which the discretionary powers of the Crown and the Ministers ought to be exercised." The convention that when a direct vote of censure is passed against a cabinet

23. See Dicey, pp. 423-424.

or when a cabinet is outvoted on a vital question it is bound to retire is equivalent to stating that the prerogative of the Crown to dismiss its servants must be exercised in accordance with the wishes of the House of Commons [24] for the executive Government must be carried on by Ministers who command the confidence of the House of Commons. The prerogatives of the Crown to choose or dismiss its ministers, to prorogue or dissolve the Parliament, to exercise the right of veto and so on are all " now practically subject to the conventions of the constitution."[25] Thus the general tendency of all conventions specially of the new conventions is to increase the power of the party which has the support of a majority in the House of Commons and finally to place all control of legislation and indeed of whole Government in the hands of the cabinet.[26]

Definition of constitutional conventions.—We have given above the definition given by Professor Dicey. A more comprehensive definition would be as follows: " Conventions are those rules and principles embodied in such precedents, practices and usages as have been found from experience to be essential to the harmonious co-operation of the three parties in whom the legislative and executive functions of Government are vested, *viz.*, the Crown, the Lords and the Commons with the object of giving effect to the will of the House of Commons and through it ultimately to the will of the nation, the political sovereign in the state.[27]

Sanction of constitutional conventions.[28]—Although constitutional conventions are no more than a

24. Dicey, p. 422.
25. *Ibid*, p. 423. See *post*.
26. See Dicey, Introduction.
27. Hal., Vol. VI, p. 317.
28. See Dicey.

body of political ethics how is it that they are invariably followed; in other words what is the sanction that enforces their obedience? Professor Dicey shows that it is not so much the fear of impeachments which have practically grown obsolete, nor the fear of public opinion but that the ultimate sanction is really the law of the land. Those who break the conventions are, generally speaking, sure to commit acts which are illegal and thus come into collision with courts by which they will be punished. Thus if the convention that the Parliament should be convened at least once a year be violated, the Annual Army Act would expire, discipline amongst the army would disappear, taxes would cease to be legally due and thus administration would be impossible without recourse to violence or illegal acts. So also if the convention that a ministry ought to retire if a vote of want of confidence be carried were ignored it would equally bring administration to a deadlock. The courts will refuse to support the Ministry and the executive in any illegal measures they may be forced to adopt in order to carry on administration. Thus breach of conventions would first lead to conflict with House of Commons and ultimately involve the breakers in illegal acts.[29]

Vagueness and variability of conventions.—Now the object of conventions being that the Parliament or the Cabinet shall ultimately give effect to the will of the electors or the nation, and as at times it becomes difficult to ascertain the views of the electors or the nation, it naturally follows that conventions must be variable and uncertain. Thus the convention that the Cabinet must retire when it no longer commands the

29. See Dicey, p. 450.

confidence of a majority in the House of Commons is only true so long as the majority reflects the views of the electorate or the nation. When however the majority do not share such views the Ministry would not be justified in retiring and can defy the House and continue in office, for the Ministry is to obey the House only so long as it represents the nation. Again, with the change of customs, conventions must change. For these reasons conventions are in their nature variable.

Examples of constitutional conventions.[30]—The following may be given as some of the examples of constitutional conventions.

(1) The Crown cannot veto a bill passed by the two Houses of Parliament.

(2) The Parliament must be convoked at least once a year.

(3) A Ministry must retire when it has lost the confidence of the House of Commons.

(4) At a certain point the House of Lords must yield to the House of Commons in every important legislation.[31]

(5) The Cabinet are collectively responsible to Parliament for the conduct of the executive and the individual members are responsible to the cabinet as a body.[32]

(6) The Cabinet is to be composed of members belonging to the party commanding a majority in the House of Commons.

30. See Dicey, pp. 416-418; Ridges, pp. 3-4.

31. This convention has now been enacted in the Parliament Act of 1911.

32. This joint responsibility of the Ministers makes it impossible for the Crown to dismiss any individual member without dismissing the whole body.

(7) The leader of such party to be the premier and to nominate his colleagues.

(8) When the majority do not represent the views of the electorate, there ought to be a dissolution of Parliament and a fresh election.

CHAPTER III.

CHARACTERISTICS OF ENGLISH CONSTITUTION.

Leading characteristics of English constitution. —The principal characteristics of English constitution and of English constitutional law are as follows:—I. Sovereignty of Parliament. II. Supremacy of law. III. Constitution based on individual rights and not rights based on constitution. IV. Flexibility of constitution. V. Adoption of conventions as part of constitutional law. VI. Divergence between theory and practice. VII. Cabinet system of Government. VIII. Constitution essentially judge-made. IX. Constitution is one of checks and balances. X. Constitution more convenient than symmetrical. Of these, I and II are by far the most important. Professor Dicey observes, " Sovereignty of Parliament and the supremacy of law are the two great principles which pervade the whole English constitution."[1]

I. Parliamentary sovereignty, what it means.[2] —Parliament means the three branches of the legislature, the House of Commons, the House of Lords and the Crown taken as a whole and not anyone of the branches singly. Parliamentary sovereignty therefore means that the three branches acting together can make and unmake any law whatsoever, constitutional or otherwise. It refers to legal or legislative sovereignty. In countries with rigid

1. Dicey, p. 402.
2. See Dicey, Ch. XIII.

constitutions, the 'fundamental' laws of the constitution are supreme and their legislatures cannot touch them or go against them. In those countries, the constitution is supreme and the legislature is subordinate whereas in England the legislature itself is supreme. It has *now* no superior, no rival. The British Parliament is at once a legislative and a constituent assembly. Parliament is omnipotent or rather omnicompetent because "Parliament is deemed to be the people and not a body with delegated or limited authority." The whole nation is supposed to be present within its walls. Its will is law.[3] In its *positive* aspect, Parliamentary sovereignty means that the Parliament can pass, repeal or alter any law and in its *negative* aspect it means that there is no other authority which can do so. Parliamentary sovereignty has not been achieved in a day. It is the result of long-continued struggle between the Crown and the people.[4] In illustration of the omnicompetence of Parliament, the Septennial Act of 1716 by which its own term was extended by four years more, the Acts of Union by which two sovereign legislative bodies were merged into one, the Act of Settlement which regulated succession to the throne, the Bill of Rights which curtailed and abolished many of the so-called royal prerogatives, the Parliamentary Act of 1911 which took away all legislative power from the House of Lords in regard to Money Bills and left only a suspensive veto to that House in regard to all public bills other than money bills, in fact which practically transferred legislative sovereignty

3. See Bryce's Amer. Commonwealth, p. 274.

4. See *post*, Ch. X, Crown, subheading "Present position of the sovereign of England" and "Examples of arbitrary exercise of prerogative in former times,"

tó the House of Commons or rather to the majority in that House, and the Representation of the People Act of 1918 which has made the constitution of England really democratic by adopting practically the principle of universal adult suffrage, may be cited. If however *referendum* comes to be ever introduced in the English constitution as it has been in the new German Federal Republic created after the war, Parliamentary sovereignty will be gone and the political sovereign will become also the legal sovereign of the state. An Act of Indemnity passed when occasion arises to make legal what was illegal, affords further conclusive proof of Parliament's omnicompetence which by a fiat of its own can even legalize illegality.[5] It may if it chooses even pass laws interfering with the freedom of religious opinion, or of worship; as it is, the liturgy and the articles of the established Church of England cannot be altered without sanction of Parliament.[5A] Thus Parliament to-day is more absolute than the most absolute monarch but whether such unlimited powers of the legislature leaving the most cherished and sacred rights of the citizens " at the mercy of a momentary gust " at Westminster Hall is an unmixed blessing is another question. In America the constitution has placed citizens' rights and liberties beyond any interference by its legislature whose powers are limited by the Constitution which is supreme, the legislature being subordinate.

Results of Parliamentary sovereignty.[6]—Parliamentary sovereignty is in regard only to legislative powers; it means the legal sovereignty of Parliament.

5. Dicey, Ch. I. An Act of Attainder is another example of Parliament's omnipotence.

5A. See Ch. XIII, " What is meant by established church."

6. See Dicey, Ch. XIII; see Ch. III, under " Supremacy of law."

Parliament seldom interferes directly with the executive or the actual administration of the country; its business is to enact the laws and not to interfere with the regular course of law. The results that follow from Parliamentary sovereignty are : (1) Flexibility of the English constitution. (2) Establishment of the rule of law. Where the legislature is supreme there is no room for interference with law by an autocratic monarch through ordinances, proclamations and the like or through mere resolutions of constituent assemblies as in France. Parliamentary sovereignty and rule of law act and react upon each other, one favours the other. (3) It is fatal to the growth of administrative law like the *droit administratif* of France, for Parliament would not tolerate any exemption of officials from the ordinary liabilities of citizens. (4) It increases the authority of the Judges who have to interpret strictly the Acts of Parliament and thus ensures the fixity of the law. (5) It makes the Parliament the final arbiter of the rights of the citizens; and (6) Parliament can abolish or modify Royal prerogatives in any manner it chooses.[6A]

Obstacles to Parliamentary sovereignty in former times.—(A) *The King.*—There was a time when the king was more or less absolute in power. At first there was no Parliament and the legislative power resided in the King in Council; but even after the Parliament was established it took a long time before it became what it is now, the legislative sovereign in the state. The Model Parliament of Edward I (1295) was the first representative Parliament in England and English Parliament in its present form may be said to date from the reign of Edward I, for before that, there was only the feudal

6A. See *post*, Ch. XI, " Effects of legislation on prerogative."

assemblage of tenants-in-chief. They acted as mere advisory bodies and the king was supreme in both legislative and executive matters. In mediæval parliaments however there was no representation by individual member, representation then being only of the *estates* and *classes*—the clergy, baronage and the commons. But even after the separation of the functions of the Crown in Council (executive) and the Crown in Parliament (legislative), *i.e.*, after Parliament had acquired legislative sovereignty, the Crown would still encroach on it rights [7] and would (*a*) legislate by proclamations as illustrated in the *case of Proclamations*, (*b*) impose taxes either indirectly as in *Bate's case* or directly as in *Hampden's case*, (*c*) dispense with existing laws in individual cases as in *Thomas* v. *Sorrel* and *Godden* v. *Hales* and (*d*) suspend existing statutes generally as in the *Seven Bishops' case*. *The case of Proclamations* [8] arose in this way. James I used to interfere with the liberty of the subject and freedom of trade in various ways through royal proclamations. Thus he would limit the choice of electors, levy impositions on merchandise, prohibit building of new houses in London or making of starch out of wheat and so on. Coke, C. J., was called before the Privy Council and asked to give his opinion on the legality of the last two prohibitions by proclamations. After conference with his brother Judges, the opinion given was (*a*) the king by proclamation cannot create any new offence, (*b*) the king hath no prerogative but what the law of the land allows him, (*c*) the king by proclamation can only warn and admonish the subjects against breaches of existing law, (*d*) if an offence be not punishable in the Star Chamber, prohibition by proclamation cannot make

7. See *post*, under "Examples of arbitrary exercise of prerogatives in former times."

8. (1810) 2 St. Tr. 723; 12 Co. Rep. 75; see Anson, pp. 322-323,

it so. In *Bate's case* (case of Impositions)[9] Bate refused to pay an additional imposition on currants levied under a Letters Patent of James I. Judgment was given in favour of the Crown on the ground that trade, along with all other foreign affairs, was a matter of general policy and as such, fell within the absolute discretion of the king and such absolute power could not be limited by statute or common law. It is different from the king's ordinary power which concerned the administration of the known existing law. *Hampden's case* (the case of Shipmoney)[10] is an illustration of direct taxation by king, ignoring Parliament. Charles I on the strength of the opinion of Judges that he was the sole Judge of the good and safety of the kingdom issued writs for the collection of a new tax called the Shipmoney. Hampden refused to pay and he was proceeded against in the Exchequer Court. A majority of the Judges decided in favour of the Crown, some on the ground that in time of necessity for defence of the realm, the king could raise money without waiting for a Parliament, whilst others went the length of holding that the king was above law or that "*Rex was lex.*" The case caused great dissatisfaction and the Long Parliament passed a statute 'Vacating and Cancelling' the judgment as contrary to laws, statutes and liberty of the subject.[11] In *Thomas* v. *Sorrel*[12] the action was for penalties for selling wines by retail contrary to a statute of Charles II. The defence was that he had authority under a letters patent of James I. The question was whether the patent was void, in other words whether the king had power to dispense with obedience

9. 2 St. Tr. 371.
10. 3 St. Tr. 825.
11. See Anson, Vol. I, p. 341.
12. (1674) Vaug., 330-359.

to laws in individual cases. Vaughan, C. J., distinguished pardon from dispensation, rejected distinction between *mala prohibita* and *mala in se* and denied the power of the Crown to dispense with any general penal law. At the same time he held that the king could dispense with an individual breach of a penal statute by which no man was injured, or with the continuous breach of a penal statute enacted for the exclusive benefit of the Crown. In *Godden* v. *Hales* [13] the question was more serious. The defendant, a military officer, was fined for not taking the oath of supremacy as required by a statute of Charles II. The plaintiff who became entitled to the forfeit of £500 brought the action to recover the amount. The defence was dispensation under letters patent from the king (James II). The court held as the laws were king's laws he might dispense with them as he saw fit. In the *Seven Bishops' case* [14] the Bishops petitioned the king (James II) praying that the order to read out from pulpits and distribute the famous ' Declaration of Indulgence ' might be cancelled as it was based upon king's dispensing power which had been declared illegal in Parliament. At that time there were many penal laws against Nonconformists and Catholics. By the Declaration of Indulgence, James wanted to suspend these laws by his own order without sanction of Parliament. To this the bishops objected. Thereupon they were charged with seditious libel. The Jury returned a verdict of not guilty. The right of king's power of general suspension of an Act of Parliament though raised was not actually decided either way in this case. All these cases show how in those days the king attempted to set himself above Parliament and

13. (1685) 11 St. Tr. 1165.
14. (1688) 12 St. Tr. 183; see Thomas's L. C. (5th Edn.), p. 9.

above law. The doctrine of " *non obstante* " which had its origin in papal bulls and which means ' notwithstanding any statute to the contrary,' the niceties of *mala in se* and *mala prohibita*, the so-called prerogatives of legislation by proclamation, of dispensation and suspension of statutes, of taxation without Parliament were all swept away by the Bill of Rights, save and except the doctrine of *salus populi maxima lex* which is still held to be a good maxim.[15]

(B) *Judges*.—In the 17th and 18th centuries there were two schools, the Parliamentarians who claimed omnipotence for Parliament and the Legalists who were opposed to that view. The judges, Coke and others, belonged to the latter school while Pym and others belonged to the former. Coke would not on any account admit the right of Parliament to legislate against the sacred principles of Common law or Divine law or against common right and reason. In the case of the *College of Physicians* [15A] commonly known as *Dr. Bonham's case* Sir Edward Coke as Chief Justice of the Common Pleas laid down a *dictum* which ultimately cost him his judgeship. The *dictum* was to the effect that " the common law will control Acts of Parliament and sometimes adjudge them to be utterly void on the ground of being against common right or reason or repugnant or impossible of being performed and the Bench as the sole repository of this common law should regard itself as thereby endowed with authority to treat statutes with the widest discretion." This old principle of English common law that even an Act of Parliament cannot interfere with the fundamental rights of the subject though discarded in England, received full recognition in the hands of the colonists in

15. See *post*, Ch. XI, under " War prerogatives."
15A. 8 Co. Rep. 114a.

America who by their constitution placed the "fundamental" rights beyond all interference by the Legislature. The subserviency of the judges in olden times was another cause which made them not unoften support the sovereign when in conflict with Parliament and the cause was removed by the Act of Settlement which made the judges removable not at king's pleasure but only on a joint petition of both the Houses of Parliament.

(C) *The Houses of Parliament acting individually.*—Even after the establishment of the legislative sovereignty of Parliament, the Houses individually, *i.e.*, the House of Commons or the House of Lords singly, would arrogate to itself the power, by a mere resolution of the House, to legislate or to nullify the effects of existing law. This is well illustrated in the cases of *Ashby* v. *White* [15B] in 1703 and again 136 years later in *Stockdale* v. *Hansard*.[16] While the case of *Ashby* v. *White* was pending, the House of Commons passed a resolution that the plaintiff by bringing the suit in a court of justice, which under the law he was perfectly entitled to do as held by the House of Lords, was guilty of breach of privilege of the House and therefore of contempt, and accordingly when subsequently a similar action was brought by five other Aylesburymen,[17] they were all committed for contempt by an order of the House of Commons and detained in prison until they were released by the prorogation of Parliament. In *Stockdale* v. *Hansard*, the House of Commons after the institution of the suit passed a resolution that the order of the House justified publication of libellous matter and courts cannot

15B. 2 Lord Raym. 938; see *post*, Ch. XVIII, "Parliamentary Privileges and Conflicts with Courts."

16. 9 A. and E. 1 (1839). See *post*, Ch. XVIII under "Parliamentary Privileges and Conflicts with Courts."

17. Case of the Men of Aylesbury, 2 Lord Raym. 1105.

question this privilege; and, when the sheriff seized the goods of Hansard in execution of the judgment of the court, he was arrested and imprisoned for contempt of the House of Commons under a warrant issued by the speaker of the House. In the first case, the House by a resolution disputed the legality of an act which was perfectly legal under the law of the land and treated such an act as a contempt, and in the second case by a resolution attempted to legalize an illegal act. The two cases show how "the House of Commons asserted a right to define its own privileges in such terms as to override rules of law." [18]

Limitations to Parliamentary sovereignty.—Professor Dicey points out that there are two limitations to the exercise of sovereign authority by Parliament, *viz.*, one, *external*, due to consideration for the opinion of the electorate or the nation, which not even the most despotic monarchy can ignore; and the other, *internal*, determined by the nature of the sovereign power itself, depending upon its composition, character, environments, social condition and the like.[19] Besides these there is a *third limitation, viz., of time,* that no Parliament can bind its successor, *i.e.*, a future Parliament and therefore its power is only a present power.[20] There are other *limitations* in the sense that its freedom of legislative action is to a large extent controlled by the influence of other bodies.[21] Amongst these the most important are—(*a*) *The cabinet*: The cabinet now practically monopolises legislation in all important matters, the individual members of the House of Commons voting as a matter

18. Anson, Vol. I, p. 185.
19. See Dicey, Ch. I, p. 71 *et seq.*
20. See Anson, Vol. I, p. 7.
21. See Ch. and Asq., pp. 21-22.

of course with their party leaders. (*b*) *The eleceorate*: it is the political sovereign in the state and its will must ultimately be obeyed by Parliament, the legal sovereign. This is what Professor Dicey calls the external limitation to the sovereignty of Parliament . (*c*) *Leagues, Associations, Unions* of workmen and employers and the like. In England there is perfect freedom of association as part of the individual liberty of every citizen as his birthright so long as there is no breach of the law of the land and Parliament in its legislative functions have naturally to take note of the views of such bodies. " Even international Combinations of workmen have at times tied the hands of the Government and Parliament." [22] The principle of giving effect to the wishes of the workers' associations has been carried a good deal further in the constitution of the new German Republic, under which every important legislation relating to social and economic policy, before its introduction into the National Assembly has to be submitted to the National Economic Council.[22A] In England also, owing to the growth of the industrial system a change is now imperceptibly taking place not only in the powers and functions of Parliament but also in the very composition of the House of Commons.

(*d*) *The League of Nations*: It is justly styled a Super-Parliament by Professor Vinogradoff.[23] It was formed after the German war (1914-1918) for international co-operation, peace and security, with a covenant and a Charter binding upon the nations constituting the League. It originated with President Wilson and now occupies a position of great importance

22. Ch. and Asq., p. 21.
22A. See Art. 165 of the Ger. Rep. Constitution.
23. Ch. and Asq., p. 21.

although it has not yet been joined by America, Germany,[23A] Russia and some smaller countries. In the sixth Assembly of the League which met at Geneva in September, 1925, fifty-four countries were represented by 350 delegates, India being one of them, represented by three delegates; the Indian delegates however were not elected by the people but selected by Government. It has large potentialities and the poet's dream of the universal federation of man may, through its agency, be one day realised, putting an end to international feuds, wars and diplomacies. Establishment of arbitration courts for settlement of international disputes, limitation of armaments and such other questions come up to for determination before the League. Parliament's action must be controlled to a great extent by the decisions of such a body.

(*e*) *The Press* : The British Press has had a very chequered career.[24] There was a time when it was subject to Licensing Acts, to censorship and other restraints. But to-day it is otherwise, the Press is now free and can ventilate its opinion fearlessly and its influence is very great indeed. It creates and moulds public opinion. It is said, every drop of an Englishman's blood is coloured by the Press. Burke compared newspapers to a " battery in which the stroke of one ball produced no effect, but the amount of continual repetition is decisive."

Legislation by bodies other than Parliament.— Although Parliament is theoretically omnicompetent in regard to legislation, in practice there are many exceptions, legislative functions being really exercised by

23A. In 1926, Germany also became a member of the League.

24. See *post*, Ch. VII, under " Liberty of the English Press."

bodies other than Parliament. Thus, in the first place, the sovereign alone can legislate for conquered and ceded countries.[24A] In the next place, in many instances there is either *voluntary* or *involuntary* delegation of legislative authority to bodies outside Parliament. As examples of *voluntary delegation* may be cited (*a*) the practice of delegating legislative power to the Crown exercised by orders in council, a practice which however repugnant to the spirit of the English constitution, is daily increasing. (*b*) Delegation of legislative powers to Administrative bodies, Companies, Corporations, Boards, Commissions, etc., so that the rules and byelaws framed by them have this force of law, has also become very common owing to the exigencies of modern society. (*c*) Delegation of legislative authority, in some instances to the Houses of Parliament, by Resolutions.[24B] As regards what may be called *involuntary delegation of legislative authority*, it has, of late, arisen owing to the enormous growth of industrial activities. In regard to many industries, such as coal and the like, legislation is virtually the work of the employers and the workmen concerned, Parliament more or less only giving effect to their compromise. This process of *industrial legislation* has been described by a learned writer as a *gradual decentralization of legislative power*. Thus in England, in practice, legislation is often shared by Parliament with bodies outside.

II. Supremacy of law, or rule of law, what it means and implies.[25]—Rule of law which is the most prominent feature of modern British constitution and underlies every constitutional principle or rule means in

24A. See *post*, Chs. XVII and XXIII.
24B. See *post*, Ch. XVII, " Who can legislate."
25. See Dicey, Ch. IV.

brief, the security given to rights of individuals which they have under the laws of the land. Its results are :—

(a) Absence of arbitrary power in Government. Inspite of the absolute immunity and irresponsibility of the sovereign, freedom and right of the subject are fully secured by the rule of law which obtains full operation in England by reason of the doctrine of ministerial responsibility which requires every executive order of the sovereign to be countersigned by a Minister or Ministers who thereby become personally responsible ; it would be no defence to say that the Minister did the wrongful or illegal act by order of the King. Rule of law not only excludes arbitrary exercise of prerogative but precludes even the vesting of large discretionary powers on departments of Government. "The spirit of the common law," rightly observed Mr. Hughes, President of the American Bar Association, in an address recently delivered in England, "is opposed to those insidious encroachments upon liberty which take the form of uncontrolled administrative authority—the modern guise of an ancient tyranny even though it may bear the labels of democracy." Thus no man can be punished or made to suffer in body or goods except for a distinct breach of law proved before an ordinary Court of Justice. (b) Equality of all persons, irrespective of rank or conditions, before law. Every person is equally subject to the law of the land and to the jurisdiction of ordinary tribunals. This is illustrated in *Governor Wall's case*,[26] (Earl) *Danby's case*,[27] the case of *Entick* v. *Carrington*,[28] of *Musgrave* v. *Pulido* [29] and other cases too numerous

26. 28 St. Tr. 51.
27. 11 St. Tr. 599 (627, 629), (1683).
28. 19 St. Tr. 1030 (1067), (1765).
29. (1879) 5 App. Cas. 102.

to be mentioned. When the defendant or the accused is brought before court, he is not allowed to plead in justification of an illegal act that he did it under King's command [30] or under state necessity [31] or in the exercise of so-called prerogative,[32] or in obedience to the order of the executive Government or any officer of state.[32A] Of course there are certain exceptions to this equality of status and personal responsibility and, certain immunities.[33]

In *Governor Wall's case,* the accused was Governor of Goree, an island on the coast of South Africa. Armstrong, one of the soldiers in the garrison, was, without trial or Court-martial, ordered to be stripped and tied to the gun carriage and lashed by negroes in consequence of which he died. The incident occurred in 1782, and twenty years later when the accused was found in England he was put upon his trial in 1802 on a charge of murder. His defence was there was mutiny in the garrison and the punishment was necessary under the circumstances. The Jury disbelieved the plea of mutiny as he could not have left the island immediately after the occurrence if there had been any mutiny amongst the soldiers, and as he did not report the existence of such mutiny to the authorities at home. The Jury accordingly returned a verdict of guilty and the accused was hanged.

In *Danby's case* [34] Lord Danby Lord High Treasurer wrote a letter to Montague then English ambassa-

30. (1679) (Earl) *Danby's case,* 11 St. Tr. 599.

31. (1765) *Entick* v. *Carrington,* 19 St. Tr. 1030 (1067). See *post,* Ch. XII.

32. *Musgrave* v. *Pulido,* (1879) 5 App. Cas. 102; see post Ch. XII.

32A. See *Raleigh* v. *Goschen* (1898) 1 Ch. 73; *Rogers* v. *Dutt* (1860) 8 M. I. A. 103.

33. See *post,* Ch. V.

34. (1679) 11 St. Tr. 599; see Thomas L. C., p. 59 (5th Edn.).

dor at the court of Louis XIV, instructing him to make a secret treaty with Louis, one of the results of which would be that Charles II would get six million livrés a year for three years thus making him independent of Parliament. The letter was written by the express command of Charles and countersigned by him. As the king could not be touched by reason of the maxim " the king can do no wrong," the responsibility was thrown upon his minister, and Lord Danby was impeached for high treason for " having traitorously encroached to himself legal power by treating in matters of peace and war with foreign ministers without communicating the same to the rest of the Council and thereby intending to defeat the provisions for the safety and preservation of his Majesty's Kingdom." Danby pleaded in defence, order of the King and produced a pardon under the Great Seal in bar to the proceedings.[35] He was committed to the Tower. Ultimately the proceedings were dropped. This case besides illustrating supremacy of law in the English constitution, went a long way in establishing another important principle, *viz.*, the principle of ministerial responsibility which briefly means that a minister carrying out an illegal order of the sovereign must take the legal consequences of his act and cannot be allowed to take the plea that he did it under the sovereign's command.[35A] (*c*) Absence of any administrative law or *droit administratif* such as prevails in France and other continental countries. There is no separate rules and separate procedure and separate tribunals as in France for the trial of cases where officials are

35. Question set at rest by the Act of Settlement (12 and 13 Will. IV, c. 2) s. 3.

35A. See *post*, Ch. XIV under " Ministerial Responsibility."

concerned or where officials commit illegal acts towards citizens in their official capacity. In England and America [36] where the rule of law is rigidly enforced the officials like ordinary citizens are tried in their individual capacity before ordinary courts of justice and under ordinary law. (*d*) It increases the authority of the judiciary —this follows from what has been stated above—and (*e*) It makes constitutional rules and principles follow mostly as the result of judicial decisions. Independence of the judiciary is the first essential for the establishment of rule of law. In most countries rule of law is now recognised at least theoretically as one of the cardinal principles of government. It was however not so always as evidenced by the Tower and the Star Chamber in England and the Bastille in France, in days that are now happily past. In the new German Republic, the constitution has given to the rule of law at least in theory its proper place, by recognising equality of status and other fundamental rights of citizens. But neither in the new German Republic nor in many of the European countries is there any provision for actually enforcing in practice the rule of law or other fundamental rights embodied in their constitutions such as is afforded in England or in America, say, by the Habeas Corpus Acts or the writ of *habeas corpus*. Further in countries with administrative courts as France or the new German Republic, rule of law cannot, from the very nature of things, have full play, for the very existence of such courts signifies the negation of rule of law.

Rule of law in India.—Theoretically supremacy of law is as much a cardinal principle of the constitution in India as in any other part of the British Empire.

36. See *post*.

Barring a few *exceptions*,[36A] there is the same equality of all persons before law. A person wrongfully confined may get back his liberty by an application under Sec. 491 of the Crim. P. Code, and the wrongdoer whether government official or private person is liable in tort, as in England, to a civil action for damages and to a criminal prosecution. When Government servants are wrongdoers they will be subject, like ordinary citizens, to the same law and same tribunals, and courts will not entertain the plea that the wrong had been committed on grounds of state policy, *i.e.*, as an act of state. In one respect, British subjects in India are allowed even larger remedies, for they can sue the Government or the Secretary of State for India in Council not only for breaches of contract but also for acts of tort.[36B] But in spite of all this, it cannot be said that British subjects in India enjoy as much security of liberty as they do in England. The reason is that the Legislature here often vests large discretionary powers in the hands of the executive, which as we have seen, is, in itself, a departure from the strict rule of law. Added to this, the proneness of those entrusted with the maintenance of law and order to invoke far too readily the maxim of *salus populi suprema lex* leads to the result that laws which interfere with the fundamental rights of the citizens and are therefore regarded by the people as " repressive laws,"

36A. *E.g.*, British subjects are not to be sentenced to whipping or not to be tried by *second* and *third* class magistrates except for very petty offences; the Indian Legislature cannot, except with previous sanction of the Secretary of State, make any law empowering any court other than High Court to sentence a European British-born subject to death (Sec. 65, Cl. 3, of the Government of India Act); provision in Section 133 of the Civil P. Code empowering Local Government to exempt persons of rank from personal appearance in court.

36B. See *post*, Ch. XII, " Acts by the Government of India in the exercise of its sovereign powers."

such as for instance, the State Prisoners' Regulations and Acts, or the Bengal Criminal Amendment Act of 1925, enabling Government to arrest and detain a man in custody, without trial before ordinary tribunals under ordinary law, have found more or less a permanent place in the Statute Book. The remedy would be by repealing such laws and preventing the legislature from passing them in future except temporarily, on occasions of real emergency as is done in England by the passing of the Suspension of the Habeas Corpus Acts—a remedy which will come within the range of practical politics only when the British Parliament amends the present Government of India Act so as to grant to India full representative legislature and an executive, responsible to such legislature.[36C]

Contrast between rule of law and droit administratif.[37]—The former no doubt secures greater individual freedom. The latter system however also possesses certain advantages over the former. It not only ensures a stronger and more efficient executive but can check beforehand the commission of crimes whereas under the former system it is only after the commission that the criminals can be punished. Further, there is a view strongly advocated by many, though stoutly denied by Dicey, that under the complexities of modern society, it often becomes necessary to vest large judicial, quasi-judicial and discretionary powers on the executive—Government departments, official Boards and the like; and, as ordinary Courts cannot or do not interfere unless an actual illegality is committed or threatened, in cases, say, of mere wrong exercise of discretion, or where only

36C. See *post*, Ch. VI, "Security of Liberty in India."

37. See *post*, Ch. XII, "Absence of *droit administratif* in English Constitution."

questions of fact are involved, the rights of the citizens, it may be said, are better protected where there are administrative Courts to check them than where there is none. In the constitution of the new German Republic there is provision for establishment of Federal Administrative Courts for "'the protection of the individual against the orders and decrees of the executive,"[38] and strange as it may appear to people brought up under Anglo-Saxon traditions, such a provision is regarded by German constitutionalists as the triumph of the rule of law in their new Constitution.[39] At any rate in **India** there is need for such administrative Courts at least till it has self-government in the true sense, because in the first place, full representative legislature India does not yet possess and legislation usually leaves large powers in the hands of the bureaucracy.[39A] In the next place, in India, the control of the superior courts over the administration " is confined within narrow bounds, both as to area and as to subject matter."[40] In England such control over the administration can be exercised in a large measure by the High Court through the prerogative writs. We will see presently how far the High Courts in India can now issue the prerogative writs in cases of administrative and other illegalities. Other remedies there are, but they also are mostly discretionary and cannot be availed of as a matter of right such as, for instance, declaratory suits, injunctions, etc. Thus, all courts in India as courts of equity, can no doubt pass declaratory decrees *if they think fit*, under sec. 42 or issue injunction as a preventive relief under section 52 of the

38. Art. 107.

39. See Const. of the Ger. Rep. by Oppenheimer, p. 168.

39A. For instance see sections 67B, 72E, 71, 72 of the Government of India Act of 1919 or see Prevention of the Seditious Meetings Act of 1907 (Act VI of 1907) and so on.

40. See Ghosh's Comp. Adm. Law, Ch. XXIII.

Specific Relief Act. But if injunction be in the nature of mandamus or a writ of prohibition, it has been held by the Judicial Committee [41] that the same principles would apply and therefore, it seems, can be issued only under the limitations embodied in section 45 of the Specific Relief Act. Besides "injunction is not a remedy which may be invoked by the citizen for the purpose of controlling public officers or tribunals in the exercise of their functions. In order to sustain it, the plaintiff must show that he has a special interest, in respect of which he will suffer a special injury. It is not enough that the community in which he resides will be injuriously affected by some governmental or legislative action." [42] In England where the right of the public is affected, a suit may be brought by the Attorney General representing the Crown as *parens patriæ* and in India under sec. 114 of the Government of India Act of 1819, the Advocate-General may institute similar proceedings.

How far the prerogative writs may now be issued by the High Courts in India.—In England although most of the ancient writs [42A] are either obsolete or replaced by statutory provisions, the prerogative writs of *habeas corpus*, *mandamus* and *certiorari* still exist, and may be availed of by the High Court in cases where other legal remedies are inadequate to check or correct illegalities by the executive, inferior tribunals, corporations or others. In *India* when the Supreme Courts were established in Calcutta, Madras and Bombay by different charters,[42B] those courts could issue the prerogative writs and other writs. This they could do, either

41. *Bank of Bombay* v. *Suleman Sanji*, 12 C. W. N. 825 (833-34).
42. Story's Equity.
42A. *E.g.*, writ of *error*, *procedendo*, *Quo warranto*, etc.
42B. Calcutta, 1774; Madras, 1800; Bombay, 1823.

under express provisions in the charters as in the case of writs of *mandamus*, *certiorari*, etc., or, as in the case of the writ of *habeas corpus*, by reason of the judges of the Supreme Courts being vested with the same jurisdiction and authority which the judges of the King's Bench could lawfully exercise in England under common law. Then when the Supreme Courts were abolished and High Courts established in their place in the three Presidency towns under the High Courts Act of 1861 (24 and 25 Vic. c. 104), they were given by that statute and the Letters Patent issued thereunder, *all* the powers of the Supreme Courts and other courts that were abolished. The chartered High Courts therefore, as successors of the Supreme Courts, could issue these prerogative writs at least within the limits of their original civil jurisdiction. Of these writs, that of *habeas corpus* (order to produce in court a person illegally detained) has a somewhat chequered career in India which will be noticed more in detail later on.[42C] According to the High Courts of Madras [42D] and Bombay [42E] writ of *habeas corpus* may still be issued under common law, independently of the provisions of sec. 491 of the Crim. P. Code, by the Chartered High Courts in India. In the Calcutta High Court however, in the recent case of *Girindra Nath Banerjee* v. *Birendra Nath Pal* [42F] Sir George Rankin, C. J., differing from the other High Courts has on a construction of the former codes of Criminal Procedure,[42G] held that the power of the Chartered High Courts, power

42C. See *post*, Ch. VI, "Application for *habeas corpus* in India."

42D. *In re R. Nataraja Iyer* 36 Mad. 72; *re Kochunine Elaya Nair* 45 Mad. 14; *In re Govindan Nair* 45 Mad. 992.

42E. *Mahomedalli* v. *Ismailji* 50 Bom. 616.

42F. 31 C. W. N. 593.

42G. Sections 81 and 82 of Act X of 1872, section 148 of Act X of 1875 and Sec. 2, Sch. I, of the Code of 1882.

inherited from the Supreme Courts, to grant *habeas corpus* under common law, has been taken away by the legislature, save and except perhaps for purposes outside the scope of sec. 148 of Act X of 1875 and of sec. 491 of the present Code of Criminal Procedure. According to the Calcutta High Court therefore, for purposes mentioned in section 491, the Chartered High Courts can no longer issue the old prerogative writ of *habeas corpus* and for such purposes the relief that can now be obtained is by an application and an order under that section. As regards the writ of *mandamus* (order commanding any person, corporation or inferior court to do some particular thing appertaining to their office or duty) the right to issue the writ which was specifically given to the Supreme Courts by their charters and therefore also inherited by the Chartered High Courts, has also been taken away from the High Courts by section 50 of the Specific Relief Act (Act I of 1877) and in its place, an order in the nature of *mandamus* can now be issued by the High Courts in the three Presidency towns within the local limits of their original civil jurisdiction under section 45 of the Act. But the issue of the order is discretionary and subject to the exceptions and provisions contained in the several clauses of the section.[42H] As regards the writ of *certiorari* (order removing proceedings civil and criminal, from inferior courts to the High Court) although the object has more or less been supplied by statutory provisions, specially by section 435 of the Criminal P. Code and section 115 of the Civil P. Code, still it has been held by the Privy Council in the case of *Besant* v. *Advocate General of Madras*[42I] that those

42H. See *in re Rasul* 41 Cal. 518; see also the judgment of Mr. Justice C. C. Ghosh *in re Jatindra Mohun Sen Gupta* 40 C. L. J. 44.

42I. 46 I. A. 176; 43 Mad. 146; 23 C. W. N. 986 (P. C.)

sections are not exhaustive and there may be cases outside the scope of those sections and in such rare cases the High Courts inheriting the extraordinary and ordinary jurisdiction of the supreme courts may still issue the prerogative writ of *certiorari*. Thus in *India* application of these prerogative writs has been limited both as to area and scope.

III. Constitution based on individual rights and not rights on constitution.—In the United States or on the Continent of Europe citizens' rights are defined in the written constitution; in England they follow from the general law of the land. For instance, the great constitutional doctrine of 'ministerial responsibility' is founded on the ordinary law of tort that every wrongdoer is individually responsible for his wrongful act. Many valued constitutional rights are no doubt often embodied in the Charters or other Parliamentary statutes which however do not embody any new principle or define any new right but only record and emphasize common law principles of individual rights and liberty. Thus in England constitution follows from general rights and not rights from constitution. In other words, in England, constitution is the *result* and not the cause of the laws of the land. The rights of citizens against the state which are known as 'fundamental rights' and are embodied in the constitution of other countries are in England really the same as rights of citizens against one another and therefore follow from private law or the general law of the land.[44]

IV. Flexibility of the Constitution.—This follows as a matter of course from the sovereignty of Parliament.

44. See Dicey; see also *post*, under "Constitution essentially judge-made.

This feature of English constitution has already been discussed.[45]

V. Adoption of conventions.—This has also been already discussed.[46] Anson rightly observes that if English constitution were stripped of conventions, "it would not only be unrecognizable, but unworkable."

VI. Divergence between theory and practice.[47] —Owing to change of customs and growth of conventions, we come across many instances of divergence between theory and practice in the constitution of England. Thus the theory that the sovereignty is one and indivisible and is vested in Parliament is belied in practice by the growth of the power of the Cabinet and the system of party government giving rise to a "real dualism in the constitution, the Crown in Parliament and the Crown in Council." Again, in legislature, the laws are in theory, acts of the Crown in Parliament, being enacted by "the King's most excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, etc." but in practice it is the House of Commons which has virtual control over every important legislation. In executive, the theory is that the ministers are servants of the Crown but in practice the King appoints them on the advice of the Prime Minister and cannot dismiss any one without the risk of losing the services of all due to the system of party government. As regards royal prerogatives, in practice, they are exercised by the Cabinet. Other examples[47A] may be given to illustrate such divergence between theory and practice.

45. See *ante*, Ch. I, p. 17 *et seq.*
46. See *ante*, Ch. II, p. 56 *et seq.*
47. See Anson, Vol. I, pp. 4-5.
47A. See *post*, Ch. XXIII.

VII. Cabinet system of government.[48]—In England the present Cabinet system has grown up gradually through conventions with the increase of the power of the House of Commons and corresponding limitation of the power of the King in the choice of his Ministers.[49] Its prominent features are (*a*) The virtual transfer of the power of appointment and dismissal of the Ministers who are not only members of Parliament and of the Privy Council but are also the heads of the various important departments of the administration, from the King to the Prime Minister or the leader of the party commanding a majority in the House of Commons; and (*b*) the joint responsibility of the cabinet to Parliament for the general policy of administration and individual responsibility of the members to the Premier and to the cabinet as a whole. It is said "the Prime Minister is the keystone of the cabinet arch." He is *primus inter pares*. He acts as intermediary between the cabinet and the crown. The characteristics of cabinet form of government give the control of the whole administration to the majority party in the House of Commons and therefore indirectly to the nation. For, when the majority in the House of Commons do not share the views of the nation, the remedy is, by convention, an appeal to the nation, *i.e.*, a dissolution of the Parliament. It is by the integration of the legislature and the executive through the Cabinet forming a connecting link between the two departments of the State that true responsible government is secured. Other countries have now mostly adopted the English Cabinet system of government, but in America the form of government is non-

48. See *post*, Ch. XV.
49. See Anson, Vol. I, p. 40 *et seq.*

cabinet, the executive being responsible not to the legislature but to the President, the executive head, who by the Constitution, is independent of the Congress.

VIII. Constitution essentially judge-made.—Mr. Dicey says that the English constitution is the result not so much of legislation as of the continuous contests carried on in the courts on behalf of the rights of individuals; in other words, English constitution is essentially a judge-made constitution.[50] We can realise the truth of this observation if we remember that in countries with rigid constitutions the fundamental rights of the citizens such as the equality of all persons before the law, right of personal freedom, the right of freedom of opinion and so on are categorically mentioned in the articles of the written constitution, *i.e.*, they follow from the constitution itself. In England on the other hand there is no declaration or definition of rights, but the principles of common law or the general unwritten law of the land are applied by Courts to individual cases. The common law principles are extended by Courts to cases where the subjects come in conflict with the Crown and its servants. Professor Dicey observes that even "Parliamentary statutes which are passed to meet special grievances bear a close resemblance to judicial decisions and are in effect judgments pronounced by the High Court of Parliament." The Habeas Corpus Acts, the Petition of Right, the Bill of Rights are, says Dicey, at bottom judge-made laws.[51] "The principles of private law have by actions of the Courts and Parliament been so extended as to determine the position of the Crown and its servants; thus the constitution is the result of

50. See Dicey, pp. 191-192.
51. Dicey, p. 217.

the ordinary law of the land.''[52] In this way great constitutional principles have been evolved. We will give here a few examples. Thus the doctrine of ministerial responsibility which has been established by the cases of *Earl Danby*,[53] of *Entick* v. *Carrington*[54] and other cases, has been the result of the application of the general law that everyone is responsible for his act and cannot take shelter under the plea of command of the sovereign or of any superior officer. So with the doctrine of liability of soldiers for wrongful acts done in obedience to manifestly illegal orders of superior officers as laid down in the decisions of *Keighly* v. *Bell*.[55] *Reg.* v. *Smith*[56] and other cases; of personal liability of public servants for wrongful acts done in their official capacity laid down in *Rogers* v. *Dutt*,[57] *Raleigh* v. *Goschen*;[58] of the freedom of the jury (*Bushell's* case);[59] of the immunity of Judges (*Halmond* v. *Howell*,[60] *Anderson* v. *Gorrie*[61]) and so on.

In numerous cases again in which neither Government nor its officers were involved but which were purely cases between private individuals, courts have often laid down great constitutional principles. Lord Mansfield's famous declaration that slavery is illegal in England, or the law that publication of libels outside the House of Commons even if made by order of the

52. *Ibid*, p. 199.
53. (1679) 11 St. Tr. 599. See *ante*, p. 76.
54. (1765) 19 St. Tr. 1030. See *post*, Ch. XII.
55. (1866) 4 F. and F. 763.
56. (1900) 17 C. G. H. Rep. 561; see Tho. L. C. (5th Edn.), p. 135.
57. (1860) 13 Moo. P. C. 209.
58. (1898) 1 Ch. 73.
59. (1670) Vaughan 135; 6 St. Tr. 999.
60. (1678) 2 Mod. 218.
61. (1895) 1 Q. B. 668.

House would be actionable, was laid down in cases between private persons. Thus in England constitutional principles are mostly generalizations drawn from decisions and dicta of judges based upon common law. Hence it is said that "English constitution has grown and not been made." In the United States, by reason of the limitation of the powers of the legislatures and the extreme brevity of the written Constitution, the task of interpretation of the constitution naturally devolves upon the courts. Thus in America also, in spite of its having a written constitution, a large bulk of constitutional principles has been built up, as in England, through judicial decisions in cases between private parties. "It is no new device," says Bryce,[62] "but a part of that priceless heritage of the English Common Law which the colonists carried with them across the sea, and which they have preserved and developed in a manner worthy of its own free spirit and lofty traditions." In fact, the judiciary in America occupies a position higher than even in England. The Supreme Court at Washington is the final authority in the interpretation of the constitution, the final arbiter of the rights of the people not only as against the executive but also against the Congress.

IX. English constitution is one of checks and balances.—At the head of the constitution is the sovereign, but his powers are strictly limited by statutes, custom and conventions. The personal irresponsibility of the sovereign is counteracted by the doctrine of ministerial responsibility. The Royal Prerogatives are exercised not by the king himself but by his Ministers in accordance with the wishes of the people. In Legis-

62. The Amer. Commonwealth, Vol. 1, 282.

lature, there is an elective (House of Commons) and a non-elective House (House of Lords) and above both, the sovereign with his right of veto. In the executive, the cabinets change but the sovereign, the supreme head abides and so do all the trained and expert permanent officials in the various departments. In America under the system known as '*spoils to the victor,*' the entire personnel "from the highest official down to the village postman" is apt to change with the change of the President, the supreme head of the executive, and he is charged with the whole Federal Administration and is responsible for its due conduct. The essence of the English system is in the equilibrium, the delicate equipoise as Bryce puts it,[63] between the three powers, the ministry, the House of Commons, and the people. The House can call the ministry to account for every act and by refusing supplies, can compel their resignation. The Ministry on their side can dissolve Parliament and appeal to the people who as final arbiters re-establish the equilibrium. Thus if the ministry go wrong the House of Commons can correct it and if the House of Commons go wrong the general body of electorate can correct it. In administrative integration or control of the cabinet as a whole over the administration, England stands midway between the absolute want of integration in America and the 'collegiate system' of Government, so to say, in France with its control by the Council of Ministers and the Council of State. Thus the peculiar position of the sovereign, system of party Government, nature of its administrative integration, the combination of lay and professional, of elective and non-elective, of permanent and non-permanent element in the Government and

63. See Bryce's Amer. Commonwealth, Vol. I, Ch. XXV.

above all the harmony between the three powers—the ministry, the House of Commons and the people—all combine to make the English constitution one of checks and balances. In spite of changes of Government by change of ministry, the equilibrium is re-established and the administration goes on as smoothly as before. "The delicate equipoise of the ministry, the House of Commons, and the nation acting at a general election, is the secret of the smooth working of the British constitution." [64]

X. Constitution more convenient than symmetrical.[65]—Where there is a cut-and-dry constitution prepared by the representatives of the nation on a particular occasion it must necessarily be a well thought-out, complete and symmetrical document. In England on the contrary where 'the constitution has grown and not been made' mostly through judicial decisions and conventions varying with change of customs, and through charters and statutes passed by an omnipotent legislature as occasions arose, and where the fundamental rights of the citizens are nowhere defined but are claimed as their birthright under the unwritten common law of the land, English constitution cannot but be wanting in the precision, symmetry or completeness of written Constitutions. It is still, and will ever be, in the process of growth. But its adaptability to changing circumstances and conditions gives it a decided advantage over rigid constitutions.

64. Bryce's American Commonwealth, Vol. I, p. 242.
65. See *ante*.

BOOK II.

The Subject.

CHAPTER IV.

ALLEGIANCE, NATURALIZATION, ALIENS, EXTRADITION AND JURISDICTION.

What is allegiance.—Coke defines it as a true and faithful obedience of the subject due to his sovereign. It is the duty of the subject towards the sovereign. It has its origin in the feudal bond under which the subjects who were termed 'liege subjects,' were bound to serve and obey the King who was their 'liege lord.'[1] It is accordingly defined in Blackstone as the "natural and legal obedience which every subject owes to his Prince in exchange for the protection extended by the Prince to the subject."[2] "Every British subject," says Mr. Justice Norman in *Ameer Khan's case*,[2A] "is born a debtor by the fealty and allegiance which he owes his sovereign and the state, and a creditor by the benefit and protection of the king, the laws, and the constitution." The subject owes allegiance to the sovereign as the sovereign owes good government to the subject which the sovereign promises by the Coronation oath. In modern times allegiance means allegiance to the *Crown*, *i.e.*, to the King in his *political* and not personal capacity; in other

1. See Hal., Vol. VI, p. 339.
2. Blackstone, Vol. I, p. 369.
2A. 7 B. L. R. at p. 240.

words means allegiance to the State, its laws and its constitution.[3]

Allegiance under common law.—Under Common law a person born within British dominions even if of foreign parents, would be a British citizen whereas one born of English parents but outside the dominions would be an alien. This was by reason of the territorial character of feudal sovereignty which made allegiance depend on the place of birth and not on parentage.[4] In other words, place of birth was the test of nationality. Again, under the C. L. maxim *Nemo potest exuere patriam* (no man can abjure his native country, *i.e.*, allegiance clings to the subject wherever he is) allegiance is due from a natural-born British subject wherever he may reside, and apart from statute, he cannot divest himself of his British nationality so as to free himself from the duty of allegiance.[5] Under common law a British subject accepting naturalisation in a foreign State was *utriusque fidei subjectus*, *i.e.*, subject of both States. In the case of a British subject becoming sovereign of a foreign independent State the tie of allegiance would be *ipso facto* dissolved. Under common law though *individual* allegiance could not be destroyed, *collective* allegiance may cease either on the total break-up of the Constitution by a civil war and so on, or on cession of a portion of the British territory, on the ground that allegiance being the correlative of protection, it naturally ceases when the sovereign can no longer *dejure* protect his subjects. In the case of cession of territory nationality will be determined by the terms of the treaty.

3. See Stepney Election Petition, Isackson *v.* Durrant (1886) 17 Q. B. D. 54. See *post*, p. 96.
4. Anson, Vol. II, Part I, p. 239.
5. See *R.* v. *Lynch*, 1903, I. K. B. 444; Hal., Vol. VI, p. 341.

Thus children born in the United States, of British parents, after the treaty of 1783 were held to be aliens[6] unless the parents adhered to the British Crown even after the separation.[7] All this has now been changed by statutes, and now a British subject may become an alien by being naturalised in a foreign country and an alien can become a British subject by being naturalised under the British Nationality and Status of Aliens Act (1914, 18 and 22).

Calvin's case.[8]—After James VI of Scotland became James I of England he wished his Scottish subjects to enjoy the rights of English citizenship. At that time England and Scotland possessed separate parliaments and separate legal systems; in fact, were two different countries or States, with the accident of having one King. Scotchmen born in Scotland before the accession of James to the throne of England were, no doubt, aliens in England, but what about the status of *postnati, i.e.*, those who are born in Scotland *after* accession of James to the English throne? Calvin was a Scotch *postnatus* and could he be regarded also as an English citizen being born in allegiance to the same King and thus acquire freehold land in England which aliens could not do in those days? This was the question for decision in Calvin's case. The judges held in favour of Calvin on the ground that though he was a Scotchman, as he was born in allegiance to one who was King of England he would be an English citizen as well. Thus a man might be a citizen of England, though by birth and parentage he belonged to another country, if both the countries were in allegiance to the same King at the

6. Doe *v.* Acklam (1824) 2 Br. C. 779.
7. Doe *v.* Mulcaster; see Kelke, pp. 27-28.
8. (1608) 2 St. Tr. 559; 7 Co. Rep. 1, 56.

time of his birth. When however the Crowns are severed the citizenship thus acquired would be lost, *i.e.*, allegiance would automatically revert to the place of birth. This was decided in the case of the *Hanoverian Electors* [9] in which it was held that Hanoverians born in Hanover while William IV of England was also King of Hanover, were citizens of the United Kingdom, but on the accession of Queen Victoria when Hanover became separated from England they became aliens and so could not vote at a parliamentary election in England. In this case the *dictum* in Calvin's case that even after severance of the crowns, those born in allegiance would continue to be citizens was dissented from, on the ground that the allegiance was not to the King in his personal capacity but in his political capacity, *i.e.*, to the Crown or the State, and so after severance of States, allegiance could no longer subsist in both the States.

Different kinds of allegiance.—There are four kinds of allegiance (1) *Natural*—due from all natural-born British subjects; (2) *Acquired*—due (*a*) from aliens who have become naturalized under the provisions of the British Nationality and Status of Aliens Acts, 1914, 18 and 22 (4 and 5 Geo. V, c. 19) or, become naturalized *en bloc* by reason of conquest or annexation of a foreign territory and (*b*) from those who have been made denizens either by letters patent from the crown under royal prerogative or by special Act of Parliament; and (3) *Local*—due from all aliens, whether friendly or enemy, domiciled or temporarily resident within the realm, living under King's protection. The first two kinds of allegiance are permanent whereas local allegiance is temporary lasting only so long as residence within the realm

9. *Re* Stepney Election Petition (1886) 17 Q. B. D. 54.

lasts. There is another and a fourth kind of allegiance *viz.*, *Legal* which is really not of much importance, due from those who already owe allegiance but have to take express oath of allegiance on accepting some high office under the Crown.

Who are natural-born British subjects.—By the British Nationality and Status of Aliens Acts, 1914 (4 and 5 Geo. V, c. 17), as amended by the Act of 1918 and 1922 (12 and 13 Geo. V, c. 44) the following persons are deemed to be natural-born British subjects :—

(*i*) Any person born within His Majesty's dominions and allegiance. Dominions include towns occupied by British forces even if the occupation be not permanent.[9A] Children of an alien enemy born during the hostile occupation of British territory would not be natural-born British subjects.

(*ii*) Any person born abroad whose father was a British subject at the person's birth and was born within His Majesty's allegiance, or to whom a certificate of naturalization had been granted, or under Act of 1918 (8 and 9 Geo. V. C. 38) who had become a subject by reason of any annexation of territory, or was at the time of that person's birth in the service of the Crown.

(*iii*) Any person born abroad whose father was a British subject at the person's birth and whose birth was registered at a British Consulate within one year, or in special circumstances, with the sanction of the Secretary of State, within two years. This clause was inserted by the Act of 1922 to include children born abroad whose father though British subject was also born abroad.

9A. For a discussion of the effect of temporary military occupation upon allegiance, see Willoughby's Public Law, p. 364 *et seq.*

(*iv*) Any person born on a British ship, whether in foreign territorial waters or on the high seas, but not if born on a foreign ship within British territorial waters.

By the law of nations (*Jus Gentium*) the children of ambassadors born abroad retain the nationality of their father.

Conditions of naturalization under Acts of 1914 and 1918.—The grant of a certificate of naturalization lies in the absolute discretion of the Secretary of State who *may* on application grant a certificate of naturalization to an alien, on being satisfied (*a*) that the alien has resided in His Majesty's dominions or been in service of the Crown for at least five years, (*b*) is of good character and has an adequate knowledge of the English language and (*c*) intends to reside in His Majesty's dominions or enter or continue in service of the Crown. Under section 8, the Government of *India* or of any of the self-governing dominions can also grant such a certificate of naturalization. No certificate takes effect until the applicant has taken the oath of allegiance. The Act of 1918 prohibits grant of certificate for ten years to any subject of a country which was at war with England at the time of the passing of the Act and further declares that a certificate may be revoked not only on grounds of fraud or misrepresentation but also on additional grounds of disloyalty or of being of bad character at the date of the grant of the certificate. In **India** certificate of naturalization is now granted under the provisions of the Indian Naturalization Act of 1926 [9B] and it is in the absolute discretion of the Local Government to grant or refuse such certificate.

Who are British subjects.—By the combined operation of Common law, Parliamentary enactments and

9B. Act VII of 1926.

Royal prerogative, British subjects would now include: (1) Natural-born British subjects. (2) Those naturalized under the provisions of the British Nationality and Status of Aliens Acts of 1914, 1918 and 1922. (3) Those who have become denizens either (*a*) by letters patent under royal prerogative (now seldom granted), (*b*) by some special Act of Parliament, (*c*) by reason of conquest of a foreign territory, the inhabitants both *antenati* and *postnati* becoming denizens and subjects, and (*d*) by reason of cession of a foreign territory, usually provision being made in the treaty giving the inhabitants the right of election to choose their nationality. (4) Alien women marrying British subjects, the nationality of the wife following that of her husband; the woman would retain British nationality even after the dissolution of marriage, by death or divorce.

From whom allegiance is due.—It is due from all British subjects whether natural-born or naturalized or who have become denizens, and even from all aliens friendly or enemy, so long as they are resident within the realm and receive protection of the sovereign. British subjects owe allegiance wherever they may reside so long as they do not cease to be British citizens by being naturalized in a friendly foreign state; they cannot divest themselves of their allegiance by being naturalized in a country at war with England. An alien residing in the realm would owe allegiance even when the State to which he belongs is at war with the King and would be guilty of treason if he were to assist his countrymen in the war.[10] The only exception to the allegiance of aliens resident in the country is in the case of alien ambassadors and persons attached to embassies.[11]

10. See Hal., Vol. IX, p. 450; see *ante*, Ch. I.
11. See *ante*, p. 98.

To whom allegiance is due.—Allegiance is due to the King for the time being, *i.e.*, to the King *de facto* whether he be the rightful heir to the Crown or not. We have seen that it is due to the king or sovereign in his political capacity, *i.e.*, as symbol and representative of the State viewed as an abstract political personality.

Nationality of married women.—Under English Common law nationality of a woman was not affected by her marriage but this has been altered by statutes under which the wife now takes her husband's nationality. Certain exceptions have however been introduced to this general statutory rule by the British Nationality and Status of Aliens Act of 1914 [11A] and the amending Act of 1918.[11B] The exceptions are: (1) the wife of a British subject may retain her British nationality if the husband during marriage ceases to be a British subject, and (2) the British-born wife of an alien may resume her British nationality if the husband dies, or the marriage is dissolved, or the State of which the husband is a subject is at war with England. In most of the other countries such as America, France, etc., the law now generally is that a natural-born woman does not necessarily lose her nationality on marriage with an alien nor an alien woman acquires the citizenship of her husband only by reason of the marriage. This at times leads to anomalies. Thus a British woman on marrying a United States citizen loses her British nationality according to English law and does not under the law of the United States necessarily acquire her husband's nationality and may be thus Stateless. Again an American woman citizen, on marrying a British subject retains her Ameri-

11A. 4 and 5 Geo. V, c. 19.
11B. 8 and 9 Geo. V, c. 38.

can citizenship and acquires British nationality under English law and has therefore a double nationality.

Status of naturalized subjects and subjects by denization.—A naturalized subject now enjoys, so long as the certificate of naturalization is not revoked, the full political and civil status of a natural-born British subject [4 and 5 Geo. V, Ch. 7, s. 3 (*i*)]. In *Speyer's case* [12] it has been held that a naturalized alien can be a member of the Privy Council. Foreigners made denizens by letters patent under royal prerogative enjoy most of the rights of citizens such as the right to hold land, to vote at a parliamentary election and so on, but cannot sit in Parliament, or be a Privy Councillor or hold any office of trust under the Crown. Letters of denization may be absolute, limited or conditional (Calvin's case). The grant of letters of denization by the Crown is not affected by the Naturalization Acts. Inhabitants both *antenati* and *postnati*, of a country conquered, become naturalized *en bloc* and acquire all the rights of British subjects, the country becoming a Crown Colony.

Loss of British nationality.—The maxim *Nemo potest exuere patriam* is no longer true. Now British nationality may be lost in the following ways :—

(1) On naturalization in a friendly foreign country in time of peace.[13] (Sec. 13.)

(2) On declaration of alienage by a person born within British dominions and allegiance, or on board a British ship or by a person who though born outside was still a British-born subject or by a person who was an infant when he was naturalized along with his father, provided the declaration is made after attaining majority

12. (1916) 2 K. B. 858.
13. See (1903) *R.* v. *Lynch*, I. K. B. 444.

and provided it is made as in case of naturalization in time of peace and not in time of war. (Sec. 14.) The first two provisions of this section contemplate cases of persons who possess double nationality at the time of such declaration.

(3) On declaration of alienage by a naturalized British subject if a convention exists between the country of origin permitting the subjects of that country to divest themselves of British nationality.

(4) On severance, after union for a time, of the Crown of another country from that of England. The inhabitants of the severed State who were born during union will thenceforth become aliens.[14] There will be collective loss of nationality also in case of cession or conquest of a portion of British territory.[15]

(5) On marriage with an alien, of a British woman. (Sec. 10.) Under common law she would not lose her British nationality. A British-born woman may become an alien even in time of war by marrying an alien enemy.[16]

Citizenship.—We have seen that citizenship or nationality is a matter of law. In other words, every State in the exercise of its sovereign authority can determine for itself whom it will consider as its citizens, under what conditions it will allow naturalization and repatriation, and so on. Citizenship implies personal relationship with the State and the status depends on the will of the state and not of the individual. Some States confer the status by reason of place of birth (*jus soli*), some by reason of nationality of the parents (*jus sanguinis*),

14. See case of the Hanoverian electors.
15. See *ante*, p. 94.
16. See *Fasbender* v. *Att. Gen.* (1922) 2 Ch. 850.

some on both grounds. Again some States do not recognize repatriation or renunciation of citizenship at all. All these causes sometimes lead to anomalies such as the possession of double or multiple citizenship in the case of some individuals and absence of any nationality in the case of others. An illegitimate child, for instance, born in Russia of an English mother would be an alien under English law and will not acquire Russian nationality under Russian law and so will be without any nationality.[16A]

Aliens and their rights and disabilities.—Alienage is opposed to nationality and allegiance. All people other than British subjects are aliens. Under Common law aliens could not hold freehold land in England, own a British ship, fill public offices or possess civic rights. They could even be expelled from the kingdom in the exercise of the royal prerogative, the last instance of the exercise of the right being in 1575.[17] Now an alien in England enjoys full *civil* rights, *i.e.*, can acquire land, enjoy full personal liberty and freedom, can sue and be sued but does not possess *civic* or political rights, *i.e.*, cannot exercise municipal or parliamentary franchise, hold any office or sit as juror nor can he own a British ship or any share therein, although a Company registered in England whose members are all aliens can own a British ship.[18]

In times of war additional restrictions were always placed by statutes upon aliens as in the 18th and 19th centuries during the wars with France, and during the late German war. By the Aliens Restriction Act of 1914 (4 and 5 Geo. V, c. 12) His Majesty was empowered during the war to make regulations for the deportation,

16A. Willoughby's Public Law, p. 358.

17. See Ch. and As., p. 32.

18. *R.* v. *Arnand* (1846) 19 Q. B., p. 806.

registration, residence, etc., of aliens. Further, the Aliens Act of 1905 [19] defines who are to be regarded as undesirable aliens and contains provisions to prevent their landing in large numbers, for their expulsion or detention in custody till embarkation and the Aliens Restriction Continuance Act of 1919 (9 and 10 Geo. V, c. 92) places further restrictions on aliens and ex-enemy aliens.

Who is an alien enemy.—It was laid down by Lord Reading in *Porter* v. *Freudenberg* [20] that the test of a person being an alien enemy is not his nationality but the place in which he resides or carries on business. A person voluntarily resident, or carrying on business, in an enemy's country is an alien enemy and, under Trading with the Enemy Act of 1915 (5 and 6 Geo. V, c. 98) a person though not residing in an enemy country but having hostile associations would also be an alien enemy. Thus the term includes not only subjects of a State at war with England but also British subjects or subjects of a neutral State voluntarily residing in a hostile country ; and a person trading even with a British or neutral subject carrying on business in the hostile territory, would be an alien enemy. "Validity of contracts does not depend on his nationality or real domicile but on the place or places in which he carries on his businesses." [21] An alien enemy may be sued in the King's Court, but cannot sue unless he be within the realm by the licence of the King. When sued he has the right to enter appearance, to defend and to appeal. In **India** also an

19. See *post*.

20. (1915) I. K. B. 857. See Garner's International Law (Tagore L. L. 1922, p. 318 *et seq*.

21. *Per* Lord Lindley in *Janson* v. *Driefontein Consolidated Mines* (1902) A. C. at p. 505 quoted by Lord Reading, C. J.

alien enemy can be sued but cannot sue except with the permission of the Governor-General in Council.[22]

Undesirable aliens.[23]—Under the Aliens Act of 1905 undesirable aliens include aliens (1) without means of support; (2) who are idiots, lunatics or suffering from any disease or infirmity; (3) those convicted of extraditable offence in a foreign country; and (4) those who are under an expulsion order. The Act contains provisions (*a*) to prevent their landing in bulk; (*b*) for their expulsion under certain circumstances and (*c*) their detention in custody till embarkation.

Extradition.[24]—It means "the delivery on the part of one State to another of those who have fled from justice." It is founded on the principle that the reciprocal surrender of criminals is "in the common interest of civilized communities." The English law of extradition depends entirely upon Statutes, the four Extradition Acts of 1870, 1873, 1895 and 1906. The Acts provide that the Crown can make treaties under these Acts with foreign States agreeing mutually to surrender persons guilty of extradition offences. Necessity for treaties arises from sovereignty and exclusive jurisdiction of each State over its territory. Delivery of any person within the territory of a State can only be with the consent of that State. By Orders in Council, the Acts are made applicable to particular States. What are extradition crimes are mentioned in the treaties and the schedules to the Acts and include murder, rape, arson, abduction, robbery, forgery, cheating, etc., but exclude all political offences. In the case of *in re Castioni*,[25] the prisoner who

22. See Sec. 83, Civil P. Code.
23. See Ch. and Asq., pp. 33-34.
24. See Hal., Vol. XIV, p. 404 *et seq.*
25. (1891) I. Q. B. 149; see Thomas's L. Cases (5th Edn.), p. 111.

was a Swiss killed a member of his Government and escaped to England where he was arrested and committed for extradition on a charge of murder. On a motion for a writ of *habeas corpus* it was held that as the offence was incidental to and formed part of political disturbances and therefore was an offence of a political character within the meaning of the Statute of 1870, the prisoner could not be surrendered. The prisoner was accordingly set at liberty. As to procedure under the Acts, a Police Magistrate either under an order from a Secretary of State or on complaint and necessary evidence, is to issue warrant for the arrest of the person wanted but he is to remain in custody and not to be surrendered until after the expiry of 15 days from the commitment to enable the prisoner to apply for a writ of *habeas corpus*. As regards trial, the Magistrate in the first place is to satisfy himself that there is an Order in Council applying the Acts to the State demanding extradition, of the requisition by the foreign State, the order of the Secretary of State, the foreign warrant, the identity of the person and a *prima facie* proof of his guilt. The Magistrate may thereupon commit or discharge the accused. After commitment, the High Court may discharge on a writ of *habeas corpus* or if the prisoner is not surrendered and conveyed out of the United Kingdom within two months of the commitment. The Acts apply to all British possessions unless otherwise expressed by Order in Council and the Governor of the British possession will do all that is required to be done by the Secretary of State. The Acts do not affect the powers of His Majesty or of the Governor-General of India for the extradition of criminals with Indian Native States or with other Asiatic States conterminous with British India. When extradition *from* a foreign State is wanted application has to be made to the Home Secretary with necessary materials.

The High Courts in **India**, it has been held,[25A] can issue writs of *habeas corpus* under section 491, of the Crim. P. Code in cases coming under the Indian Extradition Act (Act XV of 1903).

Exclusiveness of Jurisdiction and its exceptions.—Every sovereign State by reason of its legal omnipotence has exclusive and absolute jurisdiction over all persons and things within its territory. All persons whether citizens or aliens, so long as they are within the territory of the State, are subject to the jurisdiction of its courts and no other State, *except with its consent, express or implied*, can exercise legal jurisdiction. Under international law or comity based upon such consent there are however exceptions to this general rule of exclusiveness of jurisdiction. The first exception is the rule of *exterritoriality* under which persons and properties of foreign sovereigns and foreign diplomatic officials and foreign public ships [25B] in the ports or territorial waters of other States enjoy immunity from the jurisdiction of the courts of the local sovereign. The second exception is the rule of *extraterritoriality* under which a State is allowed (of course, by consent, treaty, etc.) to exercise jurisdiction by its own courts or officers over its own citizens and in some cases even over aliens, in foreign countries.

Fugitive Offenders Act of 1881 [26] (44 and 45 Vic., c. 69).—There are provisions in the Act for dealing with offenders who after committing an offence have fled from one portion of British dominion to another. Under sec. 31 of the Act, His Majesty in Council may make Orders

25A. See *In re Rudulf Stallman*, 39 Cal. 164 and *A. C. Tops* v. *Emperor*, 46 Cal. 52.

25B. The immunity is to a certain extent extended also to foreign merchant and private ships; see Regina *v.* Anderson (1868) Cox C. C. 198.

26. See Hal., Vol. XIV, p. 419 *et seq.*; *cf.* Provisions in the Indian Extradition Act XIV of 1913.

under the Act from time to time, such Orders in Council to be placed immediately afterwards before Parliament and to have statutory effect. The Act contains provisions for the arrest of the fugitive offender and his production before a Magistrate of competent jurisdiction who after taking evidence may either discharge the accused or commit him to prison to await his surrender. In the latter case the fugitive is not to be surrendered within 15 days and he is to be informed that he may apply for a writ of *habeas corpus* in the meantime.

Extraterritoriality or Jurisdiction of the Crown over British subjects abroad.[27]—The crown by treaty, capitulation, grant, usage, sufferance and other lawful means has acquired jurisdiction [28] in certain foreign countries and British protectorates not only over British subjects resident there but also in some cases over foreigners. Such jurisdiction is exercised by means of courts established in these countries by Order in Council under statutory powers.

Difference between allegiance and domicil.—Every person has two legal status, one political and the other civil; in other words, every person at birth becomes a member both of a political and of a civil society. The political status depends on the country to which he owes allegiance as a citizen or subject. It determines his nationality. The civil status depends on the country in which he has, in the eye of law, his domicil or permanent residence. It determines his personal rights and relations such as his majority or minority, his marriage, succession, testacy or intestacy and so on. Domicil does not by itself affect allegiance. An alien domiciled, owes of course *local* allegiance in the same way and to the same extent as other aliens not do-

27. See Hal., Vol. VI, p. 448 *et seq.*
28. Foreign Jurisdiction Act of 1890 (53 and 54 Vic., c. 37).

miciled but temporarily residing, but the fact of domiciliation would not destroy his *natural* allegiance to the State of which he is a citizen. Now, a man can never be without a domicil. At his birth he has what is called the domicil of origin which is the domicil which his father, if he is legitimate, and mother, if he is illegitimate, had at the time of his birth. Domicil of origin is thus a creature of law and is independent of the will of the person. A man however, when *suijuris*, can acquire *animo et facto* a new domicil called the domicil of choice. The domicil of origin is not thereby entirely extinguished, for being a creature of law it cannot be extinguished by the will of the person, but only remains in abeyance, and revives automatically as soon as domicil of choice is abandoned, the abandonment like the acquisition being *animo et facto*. The above principles were laid down by the House of Lords in the case of *George Udny* v. *John Henry Udny*.[28A] In this case the appellant prayed for a declaration that the respondent was an illegitimate son of Col. Udny and as such was not entitled to succeed. The facts are briefly as follows. Col. Udny whose domicil of origin was Scotch, subsequently acquired an English domicil which after a time, he abandoned and went to live in France. While in France he had illicit connection with a woman, as a result of which the respondent was born in 1853 in England where the woman had come for delivery. Col. Udny thereafter came to Scotland and married the respondent's mother in 1854. Now, according to Scotch law such subsequent marriage would make respondent legitimate but not according to English law.[28B] What law will apply

28A. 28 L. R. I. H. L. (Sc and D) 441.

28B. The English law has now been changed by the Legitimacy Act of 1926 under which subsequent marriage would make the children legitimate. (16 and 17 Geo. V, Ch. 60.)

depend on the domicil of Col. Udny at the time of the marriage. It was held that when Col. Udny left England for France his abandonment of English residence both in will and deed put an end to the English domicil, which was his domicil of choice, and revived his Scotch domicil, his domicil of origin. Therefore he had a Scotch domicil at the time of the marriage and the respondent accordingly became a legitimate son of his father.

CHAPTER V.

LEGAL STATUS OF THE SUBJECT.

Equality of Status; what it means.—It means that all subjects whatever their rank or position, whether officials or non-officials, are equal in the eye of law; in other words, they are all subject to the jurisdiction of ordinary Courts and liable to trial under the ordinary laws and procedure of the land. Officials are not tried by different tribunals (administrative courts) under different laws and different procedure as in France under its *droit administratif* system. In England, equality of status together with other rights of citizens such as right of personal freedom of movement, freedom of opinion, freedom from illegal arrest, freedom of discussion, right of public meeting, etc., all follow mostly from the general unwritten rule of law and from general freedom of individuals which is the birthright of every individual to act in what manner he chooses so long as he does not commit any breach of the law. In countries with rigid Constitutions like America, Belgium, Suitzerland, etc., these fundamental rights of the citizens are all embodied in the written Constitution. The written Constitution of the new German Republic, for instance, declares in Art 109 that " All Germans are equal before the law." The 14th Amendment of 1868 in the Constitution of the U. S. is also to the same effect; so also in the Constitution of the new Irish Free State.

1. See *ante*, Ch. III.

Equality of status is however the general rule and there are exceptions to this general rule. Even in England where there are no separate administrative Courts for the trial of officials, and where officials and non-officials are equally amenable to the same law, there must be, in the very nature of things, exceptions to the rule of absolute equality of status. There must be certain privileges and immunities in respect of acts done by officials in their public capacity or in the discharge of public duty. Again, there are citizens and other residents in a State who by reason of their character, antecedents, alienage or other circumstances, must be placed under restrictions and disabilities from which other citizens are free; or, who enjoy special privileges as in the case of ambassadors, etc.

Exceptions to the rule of equality of Status.—This subject has, to a large extent, been discussed elsewhere.[2] The exceptions are :

A. Immunities and privileges, of which the following are examples :—

(1) *Acts of the sovereign,* private or public.[3] The sovereign enjoys absolute immunity by reason of his not being answerable to any earthy tribunal and by reason of the maxim, that " the King can do no wrong." Not only the Crown but departments of government as agents of the Crown enjoy immunity from the jurisdiction of Courts.[3A] For his public acts, the ministers would be responsible under the doctrine of ministerial responsibility.

2. See *post*, Chs. XI and XII.
3. See *post*, Ch. XI and Ch. XII under " King can do no wrong."
3A. See *post*, Ch. XI under " Judicial Prerogative (*e*)."

(2) *Acts of tort by servants of the Crown* in their official capacity,[4] though the public servants in their private capacity would be answerable like ordinary citizens.

(3) *Acts of State.*[5]

(4) *Acts of the Governor of a Colony*, done as Governor and within the scope of his delegated authority, to be ascertained on reference to his Letters Patent and Instructions.[6] There is no immunity in regard to his private acts and, as regards public acts, there is immunity only if they are acts of state, *i.e.*, public acts done as Governor within the limits of his Commission. In *Hill* v. *Bigge*,[7] Sir George Hill, Governor of Trinidad, was sued for a debt incurred in England, in the Civil Court of Trinidad. The defendant pleaded that being Governor of the island, he could not be sued in a Court of that island. His plea was overruled and on appeal to the Privy Council, the appeal was dismissed, the Judicial Committee holding that an action would lie against the Governor in the Court of his Colony. Thus Governor of a Colony, although he is a representative of the sovereign cannot claim the legal irresponsibility of the sovereign, his authority being limited by the terms of his Commission. " To lay down in an English Court of Justice," says Lord Mansfield, " that a Governor acting by virtue of Letters Patent, under the Great Seal, is accountable only to God and his own conscience; that he is absolutely despotic, and can spoil, plunder and affect His Majesty's subjects, both in their liberty and property, with

4. See *post*, Ch. XII.
5. See *post*, Ch. XII.
6. See *post*, Ch. XII.
7. (1841) 3 M. P. C. C. 465; approved in *Musgrave* v. *Pulido*, 51 App. Cas. 102.

impunity, is a doctrine that cannot be maintained."[7A] If he does any wrongful act he may be sued by the person injured in the Court of Colony, unless he succeeds in getting an Act of Indemnity passed by the local Legislature exonerating him from the consequences of such illegal act.[8]

(5) *Public acts of the Lord Lieutenant of Ireland.* —His position is somewhat different as he is a Viceroy, *i.e.*, he fully represents the sovereign. It has accordingly been held in a number of Irish cases that no proceedings can be taken against the Lord Lieutenant in the Irish Courts in respect of acts done in his public capacity as he is vested with supreme authority.[9] In *Luby* v. *Wodehouse* the plaintiff, who was proprietor of a newspaper was arrested and his office broken into and books and papers carried away, brought action against the Lord Lieutenant in the Irish Court. In *Sullivan* v. *Spencer*, the Lord Lieutenant was sued in an action for assault committed in suppressing a public meeting by order of the Lord Lieutenant. In both these suits, all proceedings against the Lord Lieutenant were stayed on the motion of the Attorney General, the Court holding that no action is maintainable against the Lord Lieutenant in respect of acts done in his public capacity, in the Courts of Ireland so long as he holds office. As regards private acts it would seem that actions would lie as was admitted in *Luby* v. *Wodehouse* and so, the Lord Lieutenant would be liable for personal injury or debt.[10]

7A. *Fabrigas* v. *Mostyn*, 1 Cowp. 161 (173).

8. See Anson, Vol. II, Pt. II, p. 82; see *Musgrave* v. *Pulido*, 5 App. Cas. 102.

9. *Luby* v. *Wodehouse*, (1865) 17 Ir. C. L. R. 618; *Tandy* v. *Earl of Westmoreland*, 27 St. Tr. 1246; *Sullivan* v. *Earl Spencer*, Ir. Rep. 6 C.L. 173; see also Anson, Vol. II, Pt. II, pp. 301-302.

10. See Thomas L. C. (5th Edn.), p. 92.

(6) *Public Acts of the Governor-General of India.*—The **Governor-General** is also a Viceroy and therefore it seems, on the authority of the Irish cases noted above, that no action would lie against him in India in respect of any public act done as Viceroy. Under section 110 of the **Government of India Act** there is further statutory immunity not only of the Governor-General but also of the Governors, Lt. Governors, Chief Commissioners, of Members of the executive councils and Ministers, from the civil jurisdiction of the original side of the High Courts for anything done or ordered in public capacity, and also from original criminal jurisdiction (except in case of treason and felony); and, under sec. 111, the Governor-General in Council may under an order in writing, stop any proceeding, civil or criminal, on the original side of any High Court, against any person other than a European British subject. It would be interesting to trace the genesis of these two sections, 110 and 111 of the Government of India Act, for which we have to go back so far as 1781 when Statute 21 Geo. III, c. 70 (The Regulating Act), was passed, in which similar provisions were for the first time inserted by reason of the dissensions which had arisen since the establishment of the Supreme Court in Bengal in 1774 between the Judges of that Court and the Governor-General and Council of Bengal. In the words of Lord Macaulay the rivalry between the Supreme Council and the Supreme Court introduced a reign of terror into the country.[10A] Under Sec. 127, however, all persons holding office under the Crown in India remain liable to be tried in England for any offence committed in India as if it were committed in the country of Middlesex.[10B] As regards

10A. See *post*, Ch. XXIV, "The Supreme Court at Calcutta."

10B. *Cf.* similar provision in Cl. 39 of the Regulating Act of 1773 and in subsequent Government of India Acts.

private acts of the Governor-General there is no reason why he should be deemed outside the jurisdiction of the Courts in India, for he is representative of the sovereign only in his public capacity and cannot claim the prerogative of the sovereign, " that the King can do no wrong," in regard to his personal acts.

(7) *Judicial immunities.*[11]—On grounds of public policy, Judges enjoy absolute immunity, civil and criminal, in regard to acts or omissions in thier judicial capacity even when acting maliciously or without jurisdiction, but without knowledge or means of knowledge of such want of jurisdiction. Magistrates and Justices of the Peace enjoy lesser immunity, *viz.*, only when they act within jurisdiction and with reasonable and probable cause. No immunity in their case, if it is proved that they acted maliciously or without reasonable and probable cause.

(8) *Immunities of military and naval officers.*[12]—Where the military officers have jurisdiction, but it is alleged that the military law was enforced without reasonable and probable cause or wrongfully and maliciously, Courts have no jurisdiction to enquire into such matter of discipline.[13] If however the military authorities act in excess of, or without jurisdiction, they can claim no immunity and would be amenable to the law even though the injury was done in the course of actual military discipline.

(9) *Immunity by reason of orders of Superiors.* —We have seen that the general rule is that order of a

11. See *post*, Ch. XXII, " Judiciary."
12. See *post*, Ch. XVI.
13. See Anson, Vol. II, Pt. II, pp. 187-188. See also observations of McCardie, J., in *Heddon* v. *Evans*, 35 T. L. R. 142, quoted in Thomas's L. C. (5th Edn.), p. 181.

superior officer, not even the command of the King, can be pleaded in justification of an illegal act.[14] There is however an exception to this rule in the case of soldiers, sailors and policemen acting under orders of their superiors, when the orders are *not* necessarily or manifestly illegal or contrary to the law of the land, *i.e.*, when the orders are not such as they must or ought to have known that they were unlawful.[14A] Otherwise they can claim no immunity. Thus if by order of a superior, a soldier were to fire on an unoffending bystander and kill him, thereby he would be guilty of murder.

(10) *Other official immunities.*—(*a*) Personal immunity of government servants in regard to contracts entered into on behalf of Government.[15] (*b*) Immunity of higher officials for wrongful acts or negligence or default of their subordinates also in Government service. The principle of *respondeat superior* or 'let the principal answer,' *i.e.*, the master being liable for the wrongful act of the servant, cannot apply as both are servants of the Crown and not one the agent of the other, although he might have been appointed by the latter. In *Lane* v. *Cotton*,[16] the plaintiff sued Sir Robert Cotton, the Postmaster-General, for the loss of some valuable securities stolen from a letter in the post office and the suit was dismissed on the above ground. (*c*) For acts done under order or warrant, regular on the face of it.[17] (*d*) For acts authorised by Statute, if done with proper care and caution, although damage may be caused

14. *Ante*, Ch. III, under Rule of law.

14A. *Keighly* v. *Bell*, (1832) 5 C. and P. 254; see Ch. VIII.

15. See *post*, Ch. XII.

16. (1701) 1 Salkeld 17; 1 Ld. Raymond 646; see also *Raleigh Goschen*, (1898) 1 Ch. 73.

17. (1867) *Lord Mayor of London* v. *Cox*, 2 H. L. 269.

thereby.[18] It is of course implied that the act is done with reasonable care so as not to cause unnecessary or avoidable injury. Where however the Statute provides some special remedy for default or breach of duty then that remedy alone would be available.[18A] (*e*) When damage is caused by one believing *bona-fide*, but not absurdly, that he is acting legally, *i.e.*, in pursuance of a Statute, as held in *Spooner* v. *Juddoo*.[19] In this case quit rent was due in respect of a certain house in the town of Bombay. In the meantime the house changed hands but the purchaser did not get his name registered in the Government Records. The Collector drew up a distress warrant against the previous owner and had the distress warrant for the realization of Government arrears which were chiefly due from the previous owner, executed against the occupier, the purchaser of the premises, some of whose goods were seized and taken away. The Collector was thereupon sued for damages for trespass and the Supreme Court of Bombay decreed the suit awarding some damages. On appeal the Privy Council reversed the judgment holding (*i*) that as by Statutes and Charters the Supreme Court is forbidden from exercising jurisdiction in any matter concerning revenue and as quit rent was revenue, and as the plaintiff's own case brought it to the notice of the judge that the dispute was one regarding collection of revenue, the Supreme Court should have taken judicial notice of these facts, and at once stayed its hands and dismissed the suit as being outside its jurisdiction and it was not necessary under such circumstances for the defendants to plead specially want

18. See *Hammersmith Ry. Co.* v. *Brand*, (1869) 4 H. L. 171, and other cases cited in Fraser on Torts, pp. 26-29.

18A. *Mersey Docks* v. *Gibbs*, (1864) 1 H. L. 93.

19. 4 M. I. A. 353; see also *Rogers* v. *Dutt*, 8 M.I.A. 103.

of jurisdiction; (*ii*) that such want of jurisdiction existed whether the defendants acted legally and strictly according to usage, practice and the Regulations or otherwise; and (*iii*) assuming that the Supreme Court had jurisdiction to try the suit, the appellant was entitled to immunity in civil actions for acts done in the discharge of official duty even if mistake was committed thereby, honestly, under the belief that he was acting legally or within the powers conferred by Statutes, as in the present case under Reg. XIX of 1827, by drawing up the warrant against the previous owner and executing it against the occupier of the premises. But there would be no immunity if the act be not committed in the discharge of duty as was held in *Madrazo* v. *Willes* [20] where the plaintiff, as Spanish subject, brought an action against the defendant who was captain of a British man-of-war for seizure on the high seas of her ship with a cargo of 300 slaves, and was awarded damages. (*b*) Where special protection is afforded by Statute to public officers acting in good faith, in discharge of their duties.[20A]

(11) *Immunities of foreign sovereigns and ambassadors, etc.*—Over these, Courts in England have no jurisdiction unless the sovereigns submit to the jurisdiction by waiving the immunity. In *Mighell* v. *Sultan of Johore* [21] which was a suit for breach of promise of marriage, their Lordships say: " The principle to be deduced from all these cases is that as a consequence of the absolute independence of every sovereign authority,

20. (1820) 3 B. and A. 353.

20A. *E.g.*, Sec. 4 of the Epidemic Diseases Act of 1897, Sec. 86 of the Registration Act of 1908, Sec. 56 of the Electricity Act of 1910, etc. *Cf. also* Secs. 76 and 79, I. P. C.; also Judicial Officers' Protection Act of 1850. See also the Public Authorities Protection Act of 1893 which in England limits the time for actions and provides for tender of amends.

21. (1808) I. Q. B. 149 (159).

and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and everyone declines to exercise by means of its courts jurisdiction over the person of any sovereign or ambassador of any state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign or ambassador's property be within its territory and therefore, but for the agreement, subject to its jurisdiction.'' Municipal Courts do not exercise jurisdiction over foreign sovereigns, states or their Chief Executives either in regard to their public or official acts or in regard to their private acts or properties.[21A] In **India** they enjoy limited statutory immunity as they can be sued with the consent of the Governor-General in Council.[22]

(12) *Parliamentary immunities.*[23]—Freedom from civil arrest during, and forty days before and after, a session of Parliament and freedom of speech within the walls of the two Houses are the immunities enjoyed by the members. In the **Indian** Legislatures the members enjoy freedom of speech,[24] exemption from liability to serve as jurors or assessors and from arrest and detention in prison under civil process, during and for fourteen days before and after the continuance of any meeting.[24A]

(13) *Immunities of Trade Unions.*[24B]—Ordinarily any agreement between two or more persons to do an unlawful act or a lawful act by unlawful means would be

21A. (1851) *Da Haber* v. *Queen of Portugal*, 17 Q. B. 196.

22. See Sec. 86 of the Civil P. Code.

23. See *post*, Chs. XVIII and XIX.

24. See Sec. 11 and Sec. 24, cl. 7, of the Government of India Act of 1819.

24A. See Act XXIII of 1925.

24B. See also Indian Trade Unions Act (Act XVI of 1926) under which rights and liabilities of registered Trade Unions are laid down. In consequence of the late general strike, a Bill has been introduced into Parliament to amend the English Trade Disputes Act.

conspiracy and a crime, and if any actual damage is caused thereby it would be also tort. There is an exception in regard to agreements in furtherance of a trade dispute. A *trade dispute* means any dispute between employers and workmen or between workmen and workmen, connected with the employment or non-employment or the terms of the employment or with the conditions of labour of any person, and ' *workmen* ' means all persons employed in trade or industry whether or not in the employment of the employer with whom a trade dispute arises. In regard to agreements in furtherance of trade disputes the immunities are : (*a*) From criminal liability, in respect of any agreement or combination by two or more persons to do an act, provided the act if committed by anyone singly would not be criminally punishable, or does not extend to the committing of riot, unlawful assembly, breach of the peace, sedition or any offence against the King or the State.[25] (*b*) From civil liability.[26] Ordinarily if A without any lawful excuse induces B to break a contract with C, whereby C suffers damage, A becomes liable to C. Under the Trades Disputes Act of 1906 (6 Edw. VII, Ch. 47, Sec. 1) there is an exception : an act done in pursuance of an agreement or combination by two or more persons shall not be actionable if done in furtherance or contemplation of a trade dispute unless the act, if done without such agreement or combination, would be actionable. An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person, or with the right of some

25. See Sec. 3, Conspiracy and Protection Act of 1875.
26. See Fraser on Tort, pp. 123-124. See 6 Edw. VII, Ch. 47, Sec. 1.

other person to dispose of his capital or his labour as he wills. (*c*) No action lies for tort against a Trade Union in respect of any tortious act alleged to have been committed by or on behalf of the Trade Union.[26A] Peaceful picketting or peacefully persuading any person to work or abstain from working is declared to be lawful.

(14) **Immunities of quasi-judicial bodies** *like the Universities, College authorities, Clubs, Inns of Courts, etc.*[27]—They are not liable for removal, etc., of any person, provided the requirements of natural justice have been followed, *i.e.*, the act was done in good faith, after sufficient notice and the rules of the body were observed.

(15) *Immunities of parents and persons in* loco parentis.—Disciplinary measures taken by them, provided they are *bona-fide* and moderate, are not actionable.

(16) *Immunity by reason of infancy, lunacy, drunkenness, etc.*—There is qualified statutory immunity from criminal liability but not from civil liability for tort.

B. Disabilities and disadvantages.—So far we have dealt with immunities and privileges; but there are persons who labour under special disabilities. They are :

(1) *Persons belonging to special callings* like military men, clergymen, etc., who in addition to the general law of the land are subject to special laws of their particular calling or profession. They enjoy no exemption from the duties and liabilities of ordinary citizens.

(2) *Habitual offenders, Vagabonds, Reputed thieves, etc.* The ordinary rule that every person is presumed to be innocent until the contrary is proved is modified in

26A. See Sec. 4 (1) of the Trades Disputes Act of 1906 and the judgment of the House of Lords in *Cacher and sons Ltd.* v. *London Society of Compositors*, (1913) A. C. 107.

27. See Fraser on Tort, p. 24.

some respects in their case.[28] Felons convicted of treason or felony with unexpired sentence cannot sue for recovery of any property, debt, or damage,[29] nor can vote at an election.

(3) *Aliens and Alien enemies.*[30]

Status of women in England.—At present women in England enjoy almost equal civil and civic rights with men. The Representation of the People Act of 1918 (7 and 8 Geo. V, Ch. 64), section 4, has given the right of Parliamentary franchise to every woman—(*a*) who has attained the age of 30, (*b*) is not subject to any legal incapacity, and (*c*) who is entitled to be registered as a local government elector in respect of the occupation in that constituency of land or premises (not being a dwelling house) of a yearly value of not less than £5 or of a dwelling house, or is the wife of a husband entitled to be so registered. Lastly the Sex Disqualification Removal Act of 1919 (9 & 10 Geo. V, Ch. 71), Section 1, says, " subject to certain provisos of His Majesty by order in council, a person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society (whether incorporated by Royal Charter or otherwise), and a person shall not be exempted by sex or marriage from the liability to serve as a juror."

28. *Cf.* sec. 109, cl. (*b*), and sec. 110 of the Crim. P. Code.

29. See Fraser on Tort, p. 6.

30. See *ante*, Ch. IV.

CHAPTER VI.

LIBBERTY OF THE SUBJECT.

What is meant by liberty of the subject.—It means that no man is to be arrested or imprisoned except in 'due course of law;' that every man has the right to do or say anything he chooses so long as he does not infringe the laws of the land. Freedom of movement, freedom of association, freedom of speech and so on, all follow from the general liberty of the subject.[1]

Security of liberty in England and other countries.—In England, the liberty of the subject like other fundamental rights of the citizens is based on common law, on the individual freedom of every man as his birthright and does not depend on any written constitution or any code or express law. Hence it is said that "the liberties of the subject stand primarily upon the foot of common law." In other countries individual rights follow from the Constitution whereas in England the constitution is based on individual rights. In many countries liberty of the subject can be taken away by one stroke of the pen. Thus in France the constitutional guarantees of individual liberty may be suspended by the proclamation of '*Etat de Siege.*' In the new German Republic the President of the Federation can likewise suspend the fundamental rights and liberties for a time, wholly or in part, for preserving order and security within the Federation.[2] In America the rights and

1. See *ante*, Ch. V, under "Equality of Status."
2. Art. 48 of the Const. of the Germ. Fed.

liberties are more firmly secured. There is no provision in the Constitution of the United States for such general suspension of rights and liberties or for declaration of martial law, but only for the suspension of the privilege of the writ of habeas corpus in times of rebellion or invasion for the sake of public safety.[3] On the contrary *ex post facto* legislation is prohibited [4] and, as the greatest safeguard of the rights and liberties of the citizens of the United States it is declared in the 14th Amendment [5] which is justly regarded by the people of America as their Bill of Rights that " No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Thus the Constitution of the United States guards not only against unjust invasion of the rights and liberties of the people by the executive but also by its Legislatures, State or Central; for these Legislatures being, under the Constitution, subordinate law-making bodies with limited and delegated powers of legislation deriving their authority from the Constitution which alone is supreme, it follows that any Act passed by any State Legislature or by the Congress, which goes against the provisions of the Constitution would be null and void being beyond the scope of its authority and would accordingly be declared *ultra vires* by the Courts. Thus, on the whole, people enjoy even greater security of rights and liberties in America. than in England. In England there is no written constitution and so there is no need for safeguarding the rights

3. Art. I, Sec. 9.
4. Art. I, Sec. 9.
5. See *ante*, p. 21; see also Art. I of the Amendment,

and liberties by such provisions. There, the rights and liberties follow from the common law and from hundreds of decisions based on such common law and statutes and it is far from easy to take them away by one single Act of Parliament. The Habeas Corpus Acts afford for practical purposes the greatest safeguard of the personal liberty of the subjects. The Habeas Corpus Suspension Acts or the Acts of Indemnity passed by Parliament on exceptional occasions are wholly different from the power of general suspension of liberties vested in the executive by the constitution of France or Germany.[6] Martial law no doubt can be declared but only when there is war or insurrection and even then the acts done by the military authorities would be justiceable, *i.e.*, may be reviewed by ordinary courts of the land not only when the state of war is over but also, as the better opinion seems to hold, even whilst war is raging, if civil courts are actually open.[7] Lastly trial by jury which is an important feature of English common law affords in England and in the United States one of the greatest bulwarks of the liberty of the subject.

Emergency Powers Act of 1920.—In 1920 however, for the first time in the annals of British Parliament, an Act of an exceptional nature was passed which by delegating large powers of legislation by means of Regulations, to the Crown in Council in case of certain emergencies, has vested considerable arbitrary powers on the executive to interfere with the liberty of the subject. This is the *Emergency Powers Act of* 1920 [8] which no doubt provides many limitations and safeguards

6. See Dicey, p. 226; see also *post* under "Suspension of Habeas Corpus Acts and its effects."
7. See *post*, Ch. XVI, under "Martial law."
8. 10 and 11 Geo. V, c. 55.

yet, in so far as it has clothed the executive with such powers, it has sanctioned a departure from the strict rule of law which is the glory of the English constitution. The Act provides that if it appears to His Majesty that action is being taken or threatened to interfere with the necessaries of life such as food, fuel, etc., or with locomotion, he may (*a*) by proclamation declare a state of emergency, (*b*) make Regulations by Orders in Council giving necessary powers to a Secretary of State or other persons to preserve peace and public safety and to secure to the public the necessaries of life, and means of locomotion and (*c*) provide for trial of offenders against the Regulations by Courts of summary jurisdiction with power to inflict imprisonment of either kind up to 3 months or fine of £100 or both, with forfeiture of property in respect of which the offence has been committed. The safeguards provided for are: (1) Parliament, if sitting, to be informed forthwith of the occasion for such proclamation, and if not in session, to be summoned within five days. (2) The proclamation not to remain in force for more than a month without fresh proclamation. (3) The regulations to be laid at once before Parliament and not to continue after seven days therefrom, unless sanctioned by a resolution of both the Houses. (4) The Regulations may be altered or revoked by a resolution of both the Houses; and (5) the Regulations are not to impose military conscription, alter rules of criminal procedure or punish without trial, or punish peaceful picketing in order to induce people to take part in a strike. The Act does not apply to Ireland. During the general strike in England in 1926, a state of emergency was declared and Regulations were passed by Orders in Council. To give an idea of these Regulations and of their exceptional character we quote one of them. "Where there appears to be reason to apprehend that the assembly of any persons

for the purpose of the holding of any meeting or procession will conduce to a breach of the peace and will thereby cause undue demands to be made upon the police, or will promote disaffection, it shall be lawful for a Secretary of State, or for any Mayor, Magistrate, or Chief Officer of Police who is duly authorised by a Secretary of State, or for two or more of such persons so authorised, to make an order prohibiting the holding of the meeting or procession, and if a meeting or procession is held or attempted to be held in contravention of any such prohibition it shall be lawful to take such steps as may be necessary to disperse the meeting or procession or prevent the holding thereof.''

Security of liberty in India.—In India, there are no doubt safeguards for securing the liberties of the subject but the people can never enjoy that full measure of liberty and rights unless India acquires the status of the self-governing dominions, possessing representative legislature, and full responsible government, *i.e.*, executive responsible to such legislature. The Reformed Constitution under the Government of India Act of 1919 has made but a very small advance towards real self-government. So long as large powers are left in the hands of the Executive, as the power of certifying a Bill and making it law inspite of the opposition of the representatives of the people in the Assembly or in the Provincial Councils, given to the Governor-General by Sec. 67B, and to the Governors of Provinces, by Sec. 72E, or the power given to the Governor-General, to legislate, even for a limited period, by Ordinance under Sec. 72 or by Regulations under Sec. 71 of the Government of India Act, the liberties and rights of the people must necessarily to a certain extent be at the mercy of the bureaucracy.

Provisions for personal liberty in the Charters.—The Charters such as the Magna Carta or the Petition

of Right did not create any new right or enact any new principle but only embodied the common law principles of personal liberty mostly recognised in judicial decisions.[9] The provisions for personal liberty in the four great charters are:

(1) *Magna Carta* (John, 1215). No freeman to be imprisoned, exiled, etc., except by the lawful judgment of his peers, or as expressed in the confirmation of the *Magna Carta* in 5 Ed. III, c. 9, by process of law.

(2) *Petition of Right* (Car. I, 1628). Detention by king's command illegal and is no bar to *habeas corpus*. It resulted from Darnel's case.[10]

(3) *Bill of Rights* (Will. III, 1689). Forbidding excessive bail or fines, or extraordinary punishment.

(4) *Act of Settlement* (Will. III, 1791). Judges not removable at king's pleasure, and pardon under the Great Seal no bar to impeachment. Independence of the judges is the first essential for the security of the liberties of the citizens.

Slavery in England.—Slavery existed in England only (*a*) in Saxon time in the case of captives in war, and, (*b*) in a modified form, in the system of villeinage and villein tenure, of which the main characteristics were: (1) indeterminate bodily service, (2) liability to any corporeal punishment short of killing or maiming, and (3) immemorial descent. There were two kinds of *villeins*, *villeins in gross* who were freely saleable and *villeins regardant* who were attached to the land and saleable only with it. The last recorded case of villeinage was that of *Pigg* v. *Caley* [11] in which the plaintiff brought an action of trespass against the defendant for taking his horse and

9 See *ante*, Ch. II, p. 50
10. See *ante*, Ch. II, 53.
11. (1618) Noy. Reports 27.

the defendant pleaded that the plaintiff was a villein regardant attached to his manor but the court held that the plaintiff was a freeman as the system of villeinage had become completely obsolete in England. Now therefore slavery is not legal in England as was declared by Lord Mansfield in *Sommersett's case*.[12] In that case Sommersett, a negro slave who was brought to England with his master, deserted but was arrested and put on board a ship to be sent to Jamaica. A writ of *habeas corpus* was issued on the captain of the ship to show cause and the slave was released. In this case the *dictum* of Lord Northington in the earlier case of *Shanley* v. *Harvey* [13] that " as soon as a man sets foot on English ground he is free "[14] was accepted by Lord Mansfield who further laid down that slavery was so odious that it could not be supported except by positive law. In the case of *Forbes* v. *Cochrane* [15] it was held that slaves escaping into a British ship become free, the ship being regarded as a floating portion of the British territory. In the case of *Girl Grace*,[16] however, it was held that a slave on voluntarily returning with her mistress to the Colony where *lex loci* recognised slavery, she would relapse into the status of a slave. In *Buron* v. *Denman* [17] it was held that if A forcibly takes away B's slave to set him free, B might bring an action of trespass for such seizure if the law of B's country had not declared slave trade illegal, B therefore having a property in such slave, but the slave cannot be restored to his master. In 1834 slavery was

12. (1772) 20 St. Tr. 1.
13. (1762) 2 Eden, 126.
14. *Cf.* " Slaves cannot breathe in England......They touch our country and their shackles fall."
15. (1824) 2 B. and C. 448.
16. (1827) 2 Haggard's Admiralty Rep. 94.
17. (1848) 2 Ex. 167.

abolished in all British territories including Dominions, showing the sovereignty of the British Parliament over the entire British Empire.

Modes of redress when liberty is affected.[18]

(A) Through Courts :—

1. Civil action for damages in cases of false imprisonment, malicious prosecution or assault.
2. Criminal prosecution in cases of assault, battery and false imprisonment.
3. By writ of *habeas corpus*.
4. By criminal appeal or revision in cases of conviction.

(B) By use of force in self-defence.[19]

False imprisonment.—It is total restraint of liberty, for however short a time, without lawful excuse. It may be either actual, by laying hands on a person, or, constructive, for instance, when any one is told with a show of authority that he is wanted and is made to accompany the speaker. It would be no false imprisonment if the act were done under a legal warrant or without warrant when so permitted by law as in the case of arrest by a police officer to prevent a breach of the peace, etc., or done by a person by reason of his position as military officer, father, master, etc.

Malicious prosecution.—It is malicious institution of criminal, bankruptcy or liquidation proceedings against another without reasonable and probable cause before a judicial officer. Proceedings must be instituted before a judicial officer and if a ministerial officer is set in motion it would be false imprisonment and not malicious prosecution. But as pointed out by Lord Dunedin in the

18. See Ch and Asq., p. 39. See also observations of Norman, J., in *Ameer Khan's case*, 6 B. L. R.

19. See *post*.

case of *Balbhaddar Singh* v. *Badri Sah* " In any country where, as in India prosecution is not private, action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused an action will lie." In a suit for damages for malicious prosecution, the plaintiff must prove :[20] (1) that the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating. It is not necessary for him to prove that he was innocent of the charge : and (2) that the defendant acted maliciously and without reasonable and probable cause; in other words, invented and instigated the whole proceedings for prosecution. In particular cases damages may be vindictive. When proceedings other than criminal were taken plaintiff must also prove special damage.

Arrest when wrongful.—Arrest would be wrongful if made : (1) without warrant, except in cases permitted by law; (2) by illegal warrant; and (3) by legal warrant executed irregularly.

When arrest may be made without warrant.—(A) *By a police officer* :—(1) One suspected of having committed a felony; (2) to prevent a breach of the peace or when a breach of the peace has been committed in his presence. In **India** the Criminal Procedure Code contains provisions when a police constable,[21] or an officer in charge of a police station [22] or a magistrate [23] can respectively

20. See *Balbhaddar Singh* v. *Badri Sah*, 43 C. L. J. 521 (P.C.) (1926).
21. Sec. 54 : see also the observations of Mukherji, J., in *Subodh* v. *King Emperor*, 29 C. W. N. 98 (102-105).
22. Sec. 55.
23. Secs. 64 and 65.

arrest without warrant. (B) *By a private person*:—(1) One who has actually committed felony; (2) one committing or about to commit a breach of the peace; and (3) when there is a hue and cry to capture a person. Under the Criminal Procedure Code, a private person can arrest without warrant any person who commits in his view a non-bailable and cognisable offence or who is a proclaimed offender.[24] It is however most important to remember that a person so arrested either by a private person or by a police officer without warrant must be taken as soon as practicable before the nearest magistrate and cannot be detained on the pretext of collecting evidence against the accused. In *Calcutta* the Commissioner of Police cannot by reason of his being a Justice of the Peace detain a person longer than is necessary to bring him before a Magistrate.[25]

When force is justified in self-defence.[26]—Under common law every person has the right to use force: (1) against illegal violence in defence of his person, liberty or property; (2) to prevent crimes; (3) to preserve the public peace; (4) to bring offenders to justice; and (5) to protect son, wife, etc. But the use of force is subject to the restrictions (*a*) that it is necessary or indispensable, and (*b*) that the amount of force used is not disproportionate with the mischief to be averted, *i.e.*, the mischief sought to be prevented could not be prevented by less violent means. In certain cases it may extend even to killing.[27] The whole law of self-defence rests on the principle that the State undertakes to protect private persons and it is only when its aid cannot be obtained that an individual has the right to use force in self-defence only so

24. See 59.
25. See *Muhammad Sulaiman* v. *The King Emperor* (11th Aug. 1926) F.B.
26. See Ch. and Asq. pp. 48 and 49.
27. See Mayne's Crim. Law; *cf.* Sec. 99 I.P.C.

far as it is necessary and the violence used is not out of proportion to the injury to be averted.[28]

Right of self-defence under the I. P. C.[29]—Under the I. P. Code there is no right of private defence when there is time to have recourse to the protection of the public authorities, nor against a public servant acting in good faith under colour of his office or against one acting under direction of such a public servant, if the person exercising such right knows or has reason to believe that the person is a public servant or one acting under his direction, unless the act causes apprehension of death or of grievous hurt.[30] Subject to these exceptions and that the right does not extend to the inflicting of more harm than is necessary, the right of private defence of person or property may in certain cases extend even to the causing of death, *e.g.*, assault which causes reasonable apprehension of death or grievous hurt or made with the intention of committing rape or satisfying unnatural lust or kidnapping, abducting, etc.,[31] or as against robbery, housebreaking by night, etc.[32] It should be noticed that in regard to the amount of force which may be used in self-defence, there is a fine distinction between English common law and the law under the Indian Penal Code. Under the former the force to be used is never to be disproportionate to the mischief to be averted ; while under the Indian Penal Code, although under sec. 99 the right of private defence in no case extends to the inflicting of more harm than is necessary, sections 100 and 103 which lay down that in certain circumstances even death may be caused, show that the Indian law gives greater latitude to the person exercising the right of private defence and does not

28. *Cf.* Secs. 100 and 103 I.P.C.
29. See Secs. 96 to 106.
30. Sec. 99 I. P. C.
31. Sec. 100.
32. Sec. 103.

insist on the absolute balancing of the two mischiefs—one committed and the other to be averted—as under English law.

General nature of the writ of Habeas Corpus ad subjiciendum.[33]—It is a prerogative writ [34] based upon the sovereign's right to enquire into the causes which deprive any of his subjects of their liberty, issued by the High Court and the Judges of that court on reasonable cause being shown. The right to the writ is essentially a common law right as it existed,[35] and still exists at common law though now confirmed and regulated by Statutes.[35A] Several other writs of *habeas corpus* were known to the common law.[36] Speaking of the writ of *habeas corpus* Lord Birkenhead observes :[37] " It throws its root deep into the genius of our common law. The writ was more fully known as *habeas corpus ad subjiciendum*. This writ however was one of many. Thus there was a writ of *ad respondendum*, *ad satisfaciendum*, *ad prosequendum*, *ad testificandum*, and *ad deliberandum*. All these writs exhibited many features in common ; but the most characteristic element of all was their peremptoriness. To-day the substitution of more modern remedies has left the writ *ad subjiciendum*, more shortly known as the writ of *habeas corpus* in almost exclusive possession of the field. It is perhaps the most important writ known to the constitutional law of England, according as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an

33. See Hal., Vol. X, p. 39 *et seq*.

34. In other words " a writ not ministerially directed, but one of the extraordinary remedies known as prerogative writs, which are issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate "—Hal., Vol. X, p. 41.

35. Thus issued in Darnel's case (1627) and several other cases.

35A. *E.g.*, Acts of 1640, 1679, 1816 and 1862; see *post*.

36. See Hal., Vol. X, p. 39.

37. *Per* Lord Birkenhead in *Secy. of State* v. *O'Brien* (House of Lords).

instance of its case occurring in the 33rd year of Edward I. It has through the ages been jealously maintained by Courts of law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.'' *Habeas corpus* means " have his body " before court, the writ being a command by the High Court for the production of any person illegally detained either in prison or in private custody in order to enquire into the causes of such detention. As securing an effective means of release in all cases of unlawful detention, " available to the meanest subject against the most powerful '' whether they be ministers of the crown, members of the Privy Council or other government officials, it affords the greatest safeguard of the personal liberty of the subject and thus imparts to the writ its highest constitutional importance.[38] It prevents arbitrary condemnation or punishment by the executive. It places in a manner the whole administration under the supervision of the judges of the High Court who are bound to issue the writ if *prima facie* cause is made out. The writ can be addressed to any person official or non-official and in case of disobedience to the writ, the offender is liable to heavy penalties and punishment for contempt.

In the absence of a remedy like *habeas corpus*, the personal liberty of the subjects cannot be so safe, however much it may be declared to be inviolable in the written constitution. Professor Dicey therefore rightly observes that for practical purposes the Habeas Corpus Acts " are worth a hundred constitutional articles guaranteeing individual liberty.'' [39] The American Constitution also provides for the writ and further declares that the privilege shall not be suspended unless when in cases of

38. Hal., Vol. X, p. 40.
39. Dicey, p. 195.

rebellion or invasion the public safety may require it.[40] In France, Germany or other countries of Europe the privilege is not enjoyed by the people with the result that the personal liberty of the people is not so secure as it is in England or America, for the obvious reason that the enforcement of a right is far more important for practical purposes than mere declaration of such right.

Habeas Corpus Acts, their nature and scope.— The Acts do not lay down any new principle or define any new right. They are essentially Procedure Acts laying down provisions by which a person can speedily regain his personal freedom of which he has been unlawfully deprived and to which he is entitled as his birthright under the common law of England. The right to the writ is a common-law right and the Acts only regulate that right. The first Statute was the Act of 1640 (16 Car. I, c. 10, s.6) which is still in force and which gives to every person the right to the immediate issue of a writ in case of imprisonment or restraint of liberty by command of the King or of his Privy Council. The Habeas Corpus Act of 1679 (31 Car. II, c. 2) applies only to persons detained in custody for some criminal or supposed criminal matter. The Act of 1816 (56 Geo. III, c. 100) is applicable to cases of persons deprived of their liberty otherwise than in criminal proceeding, *e.g.*, in cases of children taken away from the custody of parents and lawful guardians, of persons confined in lunatic asylums, nuns confined in convents, etc. Act of 1862 enacts that no writ is to be issued out of England into any colony or dominion where a court of justice having authority to grant writ has been established.

How the Habeas Corpus Act of 1679 (31 Car. 11, c. 2, s. 10) came to be passed.—Although *habeas*

40. Art. I, Sec. 9.

corpus was and is still allowed under the common law of England, relief was often denied or delayed on some pretext or other. Thus in Darnel's case,[50] *habeas corpus* was refused on the ground that king's command was sufficient justification for detention. The decision gave rise to great dissatisfaction and ultimately led to the passing of the celebrated Petition of Right in 1628 and later on, to the passing of the Habeas Corpus Act of 1640. In spite however of the Petition of Right and the Act of 1640 persons continued to be illegally detained. In 1676, *Jenks' case*,[51] once more brought matters to a head. Jenks was imprisoned for a speech in which he had only moved, for a deputation for petitioning His Majesty (Charles I, who actually presided at the Council Board during his trial), that he would be graciously pleased to call a new parliament. Repeated applications for *habeas corpus* were rejected on flimsy grounds such as, that it was vacation, that there had been a change of prison and so one, the prisoner in the meantime rotting in jail for over four months. This again caused great dissatisfaction and the Habeas Corpus Act of 1679 (31 Car. 2, c. 2, s. 10) was passed to prevent resort to devices by which the common-law right to the writ was hitherto evaded.

Important provisions of the Act of 1679 (31 Car. II. c. 2. s. 10).[52]—The Act applies only where a person is detained on a criminal charge. The Statute which was passed " for the better securing the liberty of the subject " provides amongst others :

(1) That the Lord Chancellor or any Judge of the High Court is bound to award a *habeas corpus* returnable

50. (1627) 3 St. Tr. 1. See *post*, Ch. XI.
51. (1676) 6 St. Tr. 1189.
52. For a summary of the Act, see Ch. and Asq. pp. 42-43.

immediately before himself on application by or on behalf of any person committed or detained *in the vacation* for any crime other than treason or felony.

(2) That the officer having the prisoner in his custody is bound to produce the prisoner within a limited time, who, if the offence be bailable, is to be let out on bail.

(3) That in cases where the prisoner is committed for treason or felony he can claim to be tried at the next session and if not so tried to be discharged.

(4) That no person once delivered by *habeas corpus* is to be recommitted for the same offence.

(5) That the officers or keepers are bound to make due returns and not to shift the prisoner from one prison to another without sufficient reason or authority.

(6) That no inhabitant of England is to be sent as prisoner to Scotland, Ireland, Jersey, Guernsey, Tangier or any place beyond seas within or without the king's dominions.

(7) That the Lord Chancellor or Judge denying *habeas corpus* is to forfeit to the aggrieved party £500; the jailor or keeper neglecting to make due returns or shifting prisoner without sufficient cause is to forfeit £100 for the first offence and £200 for the second offence; and other persons neglecting their duties as aforesaid similarly to forfeit penalties to the aggrieved party.

Habeas Corpus Act of 1816 (56 Geo. III, c. 100, s. 1).—It applies to all cases of civil detention other than where imprisoned for debt or by process in any civil suit.[53] The court is bound to issue writ during vacation, where application is supported by affidavit or affirmation that

53. See *ante.*

there is a reasonable ground for such complaint. **Disobedience** to the writ amounts to contempt of court and is liable to be punished as such.

Places abroad to which the writ may be issued.—The writ of *habeas corpus* may be issued by the High Court of England to the Channel Islands and the Isle of Man but by reason of the Habeas Corpus Act of 1862,[54] not to any colony or foreign dominion where courts of justice authorised to issue such writs have been established by the Crown. "Until 1862 the Court of Queen's Bench at Westminster had power to issue writs of *habeas Corpus* to all parts of Her Majesty's dominions, even to those parts in which there were independent Legislatures, as was done in the case of *In re Anderson*,[55] where a *habeas corpus* was issued to Canada.[56]

Cases where habeas corpus is granted.—It is granted in all civil and criminal cases of wrongful deprivation of personal liberty. In the past, the writ was often applied for in order to set free aliens brought into England as slaves.[57] Now the writ is generally availed of in extradition cases and in cases under the Fugitive Offenders Act to test the regularity of the commitment. There are provisions in both these Acts that the prisoner is not to be surrendered until after the expiration of fifteen days from commitment so as to enable him to apply for a writ of *habeas corpus*.[58] The writ is also often invoked to test the validity of the warrant or order under which a person is detained, for instance, where he is imprisoned under the sentence of a naval, military or

54. 24 and 25 Vic., c. 20.
55. 30 L. J. Q. B. 129.
56. *Per* Norman, J., in *Ameer Khan's case*, 6 B. L. R. 392.
57. See Ch. V under "Slavery in England."
58. See Hal., Vol. X, paras. 106 and 107.

ecclesiastical court.[59] In civil cases, the writ besides other cases, is mostly applied for, where a parent or other guardian is wrongfully deprived of the custody of an infant.[60]

Cases where the writ will not be issued.[61]—(1) Where committed for treason or felony plainly expressed in the warrant of commitment. (2) When undergoing a legal sentence. (3) When a person is abroad, or on board a foreign man-of-war or in respect of an alien detained in England in a foreign embassy or legation of the country to which he belongs. (4) Where a person is committed by either House of Parliament for contempt for breach of privilege.[62] (5) Where an alien (not friendly alien) is detained as a state prisoner on political grounds This being an act of state, municipal courts have no jurisdiction to interfere.[63] (6) In **India,** according to the Calcutta High Court,[64] no writ of *habeas corpus* can be issued into the *mufussil,* and within the limits of the original civil jurisdiction of the chartered High Courts, not for any of the purposes mentioned in section 491 of the Criminal P. Code. Again even an application for *an order in the nature of habeas corpus* under sec. 491 cannot be made on behalf of persons detained without trial under the State Prisoners' Regulations, State Prisoners' Acts and Bengal Criminal Law Amendment Act of 1925.[65]

59. See Hal., Vol. X, para. 105.

60. See Hal., Vol. X, para. *et seq.*

61. See Hal., Vol. X, paras. 101, 102, 103.

62. See *post* Ch. XVIII, under "Privileges of the House of Commons."

63. *In re Maharanee of Lahore*; Taylor 433; in the matter of Ameer Khan 6 B.L.R. 392. See *post.*

64. See *post* "Application for *habeas corpus* in India."

65. An attempt was made to introduce a Bill in the Legislative Assembly repealing these repressive laws but it failed.

Modern practice as to writs of habeas corpus.—To move through Counsel the Divisional Court of the King's Bench when the Court, except in urgent cases, issues a *rule nisi.* During vacation, application is made to a judge sitting in chambers. At the hearing of the rule the person detaining the prisoner submits his return showing cause of detention and the court decides whether to issue a writ for the production of the prisoner or to discharge the rule. When the person is produced, the court may make no order at all, or discharge the person detained or let him out on bail. In the famous case of *Rex* v. *Halliday* [66] Zadig, the prisoner, obtained from the King's Bench a rule calling upon Halliday, the governor of the internment camp, to show cause why the writ of *habeas corpus* should not issue. On cause being shown the rule was discharged by the Divisional Court and the order of the Divisional Court was affirmed by the Court of Appeal and ultimately by the House of Lords (Lord Shaw dissenting).[67] As regards appeal, there is always an appeal against an order *refusing* writ but no appeal lies against an order *granting* writ where the court determines the illegality of the detention and the prisoner's right to liberty.[68]

Effects of the writ of habeas corpus.[69]—No person can be arbitrarily imprisoned or detained in custody.

(2) No person committed to prison on a charge of crime can be kept long in confinement either without bail or speedy trial.

66. (1916) I. K. B. 738. See *post*.
67. (1917) A. C. 260. See *post*.
68. See *ex parte* O'Brien, (1623) A. C. 603. See also Sec. 31, cl. *i*(*i*) of the Supreme Court of Judicature (Consolidation) Act of 1925.
69. See Dicey, p. 224.

(3) It invests the Judges of the High Court with authority to supervise the whole administrative system so far as it affects the personal liberty of the citizens.

(4) It prevents the growth of any system, akin to the 'droit administratif' of France under which people may be kept in custody without trial.

(5) It deprives the Crown, now the Ministry, of the arbitrary power of imprisonment on mere suspicion or for reasons of state.

Suspension of Habeas Corpus Acts and its effects.—The Suspending Acts are passed by Parliament as temporary measures on grounds of urgent political necessity in times of political unrest. So long as the Suspending Act remains in force Government or the Ministers can arrest and detain in custody without bail or trial persons suspected of treason or other political crimes. The Suspension Act does not however legalise such arrest or detention but only prevents the Judges from taking action for a time; the Ministers or other Government officials so arresting or detaining would not be free personally from criminal or civil liability but they are invariably protected by the passing of an Act of Indemnity before the period of suspension expires. The Acts of Indemnity are retrospective statutes which by legalizing illegal acts exonerate persons who have acted illegally. The two together, *i.e.*, Act of Suspension followed by an Act of Indemnity, vest the executive with arbitrary power but the occasions when such measures become necessary are very rare and even then it is wholly different from the general suspension of the constitutional guarantees in continental countries or the proclamation of *etat de siege* in France.[70] In the first place an Act of

70. See Dicey, p. 226.

Suspension is a legislative measure passed by Parliament representing the nation whereas general suspension of the citizens' rights is effected by a *fiat* of the executive ; secondly, even an Act of Suspension cannot afford protection for illegal acts committed outside the scope of the statute as it only suspends the rights of the subject with regard to bail or speedy trial only in the case of the specific offences enumerated in the suspending Act, the common-law right to the writ of *habeas corpus* in all other cases remaining unaffected ; and lastly even an Act of Indemnity does not afford protection to anyone committing an illegal act *mala fide* or without probable and reasonable cause.[71]

Habeas Corpus for persons interned under Regulations passed under the Defence of the Realm Act.— During the late German War the British Parliament for the first time delegated large arbitrary powers to the executive. By the Defence of the Realm (Consolidation) Act of 1914 (Dora) power was conferred upon the King in Council during the continuance of the war " to issue Regulations for securing the public safety and defence of the realm." Regulation 14B passed under the Act empowered the Secretary of State " to order the internment of any person of hostile origin or associations for public safety and defence of the realm." In the case of *Rex* v. *Halliday*,[72] one Zadig, a German by birth but who had become a naturalised British subject, was interned by an order of the Secretary of State under the Regulation. Application was made for a writ of *habeas corpus* on behalf of the prisoner and the *rule nisi* issued upon

71. See Thomas's L. C. (5th Edn.), p. 96 (note).
72. (1916) 1 K. B. 738; (1917) A. C. 260.

Halliday, the Governor of the internment camp, was discharged by the Division Court and the order of dismissal was affirmed by the Court of Appeal and ultimately by the House of Lords, Lord Shaw only dissenting. It was argued on behalf of the prisoner that the Regulation in question was *ultra vires* of the Statute (Dora) and therefore his detention was illegal. The contentions[73] on behalf of the prisoner were all overruled by the majority of their Lordships who held that the Regulation was not *ultra vires* but was valid and therefore the detention was not illegal. Lord Shaw whose dissentient judgment[74] is regarded by the legal profession as the more correct exposition of the law, declared the Regulation to be *ultra vires*. He observed that "if Parliament had intended to make this colossal delegation of power it would have done so plainly and courageously and not under cover of words about regulation for safety and defence. In modern times the form of using the Privy Council as the executive channel for statutory power is measured and must be measured strictly, by the ambit of the legislative pronouncement. And that channel itself, seeing that under the constitution His Majesty acts only through his Ministers, is simply the Government of the day. The author of the power is Parliament; the wielder of it is government. Whether the government has exceeded its statutory mandate is a question of *ultra* or *intra vires*." The judgment of the Court of Appeal in *Ex parte O'Brien*[75] is also important as showing the jealous care with which courts guard the liberty of the subject. In

73. For the arguments for and against, see Thomas's L. C. (5th Edn.), pp. 97-98.

74. Students should read the whole of the judgment of Lord Shaw from the Reports.

75. (1923) 2 K. B. 361; and (1923) A. C. 603.

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this case O'Brien was arrested and deported to the Irish Free State under an order of the Home Secretary, purporting to be made under Reg. 14B. It was held by the Court of Appeal that Reg. 14B was inconsistent with the Irish Free State Constitution Act of 1922 (13 Geo. V, ss. 2·31) and therefore impliedly repealed by it. The order for the issue of a writ of *habeas corpus* upon the Home Secretary was made absolute, the Appeal Court holding in effect that the Home Secretary, acting under powers contained in certain obscurely worded Orders in Council cannot deport an inhabitant of England to a Colonial prison under a warrant which amounted to a *letter de cachet*. Upon appeal to the House of Lords by Government it was held no appeal lay from an order granting a writ of *habeas corpus* determining the illegality of the applicant's detention.

Application for habeas corpus in India.—We have seen that the three chartered High Courts in India as successors of the Supreme Courts could issue the prerogative writ of *habeas corpus*. But whether such writs could be issued also into the *mufussil* is a question on which there has been some difference of opinion.[76] In the case of the *Justices of the Supreme Court at Bombay*[77] it was held by the Privy Council that the writ could be issued only to persons resident within the local limits of the jurisdiction of the Supreme Court and to such persons outside such limits as were personally subject to its jurisdiction (*e.g.*, European British subjects, servants of the East India Co., etc.). In the great Wahabi case (In the matter of *Ameer Khan*[78])

76. See observations of Rankin C. J. in *Girindra* v. *Birendra* 31 C. W. N. 593 at p 614.

77. Knapp's P. C. cases 1. See also 50 Bom. 616.

78. 6 B. L. R. 392; on appeal 6 B. L. R. 489.

Norman, J., held that such writs were very frequently issued to the Mufussil by the Supreme Court at Calcutta since its establishment, and the High Court as its successor could therefore also issue it into the *mufussil.*[79] The decision has been followed by the High Courts of Madras[80] and Bombay.[81] In *Ameer Khan's* case which was argued on behalf of the petitioner by Mr. Anstey with " a learning and forensic ability unsurpassed in the annals of trials in India," the facts are briefly as follow. Ameer Khan, an old man of 75, was arrested on the 10th of July 1869 in his Calcutta residence at Collootola, conveyed to Gaya jail, from where he was subsequently removed to Alipore jail. No warrant was shown, nor was he informed what were the charges against him, but only a few days before his application in the High Court, he was told that he had been arrested and detained under a warrant issued by the Governor-General in Council under Reg. III of 1818. On the 1st of August 1870, Mr. Anstey moved before Norman, J., for a writ of *habeas corpus* on Dr. Fawcus, Superintendent of the Alipore jail, to produce Ameer Khan in Court. The judge instead of issuing the writ, issued a rule *nisi* on Dr. Fawcus to show cause why the writ should not be issued. At the hearing of the rule, Mr. Graham, the Advocate General, appeared on behalf of Dr. Fawcus to show cause against the rule and raised the preliminary objection that the arrest and detention being acts of state, done by Government on grounds of state policy, no municipal court could interfere in such

79. " The distinction between Presidency towns and Mofussil originated in the distinction between the Company's Factories and the Mogul territory."—Cowell, p. 79.

80. *In re Govindan Nair*, 45 Mad. 922 (F. B.).

81. *Mahomedalli* v. *Ismailji*, 50 Bom. 616.

matters. The objection was overruled on the ground that such a plea could never be entertained in times of peace, against a British subject. On the merits, it was held that Reg. III having been re-enacted in two subsequent Acts, *viz.*, *Act* XXXIV of 1850 and Act III of 1858 and these Acts[82] having been duly passed by the Governor-General in Council under the authority of the Statute of 1833 (3 and 4 Will. IV. ch. 85, sec. 43), and such legislation falling within the principle '*salus populi suprema lex*,' similar to the suspension of the *Habeas Corpus* Acts by Parliament in England, it was not *ultra vires* and the arrest and detention having been under a warrant by the Governor-General in Council in the proper form under Reg. III, the detention was not illegal and therefore no writ could be issued, and the rule was accordingly discharged. There was an appeal against the order, and it was further argued before the appellate court (Phear and Markby, J.J.), that the provisions of Regulation III and the two subsequent Acts empowering government to arrest and imprison a British subject without trial, were *ultra vires* by reason of their contravening one of the limitations to the legislative powers of the governor-general in Council laid down by Statute 3 and 4 Will. IV, ch. 85, sec. 43, *viz.*, "that such laws and regulations shall not in any way affect. . . any part of the unwritten laws or constitution of the United Kingdom of Great

82. By Act III of 1858 the powers under Reg. III were extended without restriction within the limits of the jurisdiction of the Supreme Court at Calcutta, so that all persons, European British subjects and natives, living within such limits under the protection of English law could be arrested. Thus the effect of Reg. III and the two Acts is that the Governor-General in Council may by a warrant arrest and detain without trial British subjects within or without the jurisdiction of the Supreme Court and such warrant is a good return to a writ of *habeas corpus.*—See in the matter of *Tuckut Roy*, Boul. Rep. 354.

Britain and Ireland, whereon may depend in any degree the allegiance of any person to the crown. . . .'' It was contended that as allegiance and protection were correlative, the provisions of the Regulation and the two Acts taking away such protection from the subject by empowering Government to arrest and detain a person without due trial were *ultra vires*, being contrary to the unwritten common law of England under which no person could be arrested and detained without due trial. The appellate court overruled the contention holding that the words of Statute Will. IV did not warrant such an interpretation. In the case of *Bugga and others* v. *King Emperor*[83] similar provisions in the Government of India Act of 1915[84] came up for discussion before the Privy Council, and Lord Cave, approving of the interpretation of Phear, J., in Ameer Khan's case, observes, ''The subsection does not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the common law upon the observance of which some person may conceive or allege that his allegiance depends. It refers only to laws which directly affect the allegiance of the subject to the crown, as by transfer or qualification of the allegiance or a modification of the obligations thereby imposed.''[85]

Let us see in the next place how far legislation in India has affected the common-law right of the subject to the prerogative writ of *habeas corpus*, in cases of illegal confinement. In England, in spite of the passing of the *Habeas Corpus Acts*, the common law right to the writ still exists, and the Acts only regulate the procedure

83. I. L. R. 1 Lah. 326 (P.C.)
84. See 65 Ch. 2 (*ii*) Government of India Act, 1919.
85. I. L. R. 1 Lah. 326 at p. 336.

for obtaining speedy relief. The Madras and the Bombay High Courts maintain that in every part of the British Empire, every person has a right to be protected from illegal imprisonment by the issue of the prerogative writ of *habeas corpus* and that the power of the chartered High Courts to grant such writ has not been abrogated by the provisions of sections 491 and 491A of the Criminal Procedure Code. We have seen that in the recent case of *Girindra Nath Banerjee* v. *Birendra Nath Pal*,[86] Sir George Rankin, C. J., and Majumdar, J., have taken a contrary view and have held that the Indian Legislature has taken away this power from the chartered High Courts at least for purposes mentioned in section 491 of the Crim. P. Code. Now two questions arise for consideration in this connection: (*i*) whether the Indian Legislature can derogate from the powers vested in the High Courts by the High Courts Act of 1861 (24 and 25 Vic., c. 104) and the letters patent issued thereunder; and, (*ii*) if so, whether the Indian Legislature has actually taken away the power—the power inherited by the chartered High Courts to issue the prerogative writ of *habeas corpus* under common law. In the above case of *Girindra* v. *Birendra* both the questions have been answered in the affirmative. In that case the facts are briefly as follow. The petitioner Girindra was arrested in his Calcutta residence under Reg. III of 1818 and confined successively in Alipore and Midnapore jails from where he was subsequently conveyed to Canning Town in the 24-Pergs., and, an order under section 11 of the Bengal Criminal Law Amendment Act, 1925, was served upon him requiring him amongst other conditions, to

86. 31 C. W. N. 593; see *ante*, Ch. III, 'How far Prerogative writs may be issued in India.'

reside within certain defined limits and to report himself twice daily to the officer-in-charge of the Police Station, failing which, he was liable to be imprisoned for three years. The petitioner complied with the order and then moved through Counsel before Mr. Justice Buckland, sitting on the original side of the High Court, for a writ of *habeas corpus* on Birendra, the sub-inspector of Police of Canning town, on the ground that the detention was illegal in as much as section 11 of the Bengal Act was *ultra vires* of the Local Legislature, being contrary to section 80A, clause 4, of the Government of India Act of 1919 which says "that the Local Legislature cannot make any law affecting any Act of Parliament;" section 11 of the Bengal Act empowering government to detain a person in custody without trial was therefore void and *ultra vires* being opposed to the Magna Charta, Petition of Right and other similar Acts of Parliament. Buckland, J., without deciding that question, rejected the application for *habeas corpus* on the ground that upon the facts it could not be said that there was any physical restraint by the Police Officer and the petitioner was in his custody. On appeal against this order rejecting the application, a preliminary objection was raised by the Advocate General that no appeal lay, in as much as it was not an order on an application for the prerogative writ of *habeas corpus* under common law, which no longer existed in India, having been abolished by Legislature, but an order on an application under section 491 of the Criminal P. Code. The order being therefore an order of a single judge 'in the exercise of Criminal Jurisdiction,' appeal was barred by section 15 of the Letters Patent of 1925.[87] In order to decide the preliminary objection which was

87. For a contrary view see *Mahomedalli* v. *Ismailji*, 50 Bom. 616.

ultimately given effect to, the appeal court had to decide the other two questions already referred to. On the further question whether section 11 of the Bengal Act is *ultra vires* by reason of clause 4 of sec. 80A of the Government of India Act, it has been held in this case that the clause refers only to such Acts of Parliament which apply *by their own force* as a determination of the will of Parliament " and not to rules and principles of English statutes which from the peculiar circumstances of factories and settlements of the East India Company in the early days, might have been introduced. Rankin, C. J., observes, " The clause cannot be construed as meaning that because in 1726[88] when there was no other law, the Courts in Calcutta adopted the law that prevailed at home, subject to many modifications, therefore any part of that law so introduced which originated in Statute as distinct from Common law cannot be interfered with by local legislature. In regard to the 1st question, *viz.*, the power of the Indian Legislature, it has been held, on a construction of the Letters Patent, the High Courts Act of 1861 and section 22 of the India Councils Act of 1861, that even before the Government of India Act of 1919[89] " the jurisdiction, powers and authority of the High Courts " were subject to the legislative powers of the Indian Legislature which could therefore modify or affect the powers of the High Courts inherited from the Supreme Courts. On the 2nd question whether the Legislature has taken away from the chartered High Courts the power of issuing the prerogative

88. When the Mayor's Court was established in Calcutta under the Charter of 1726.

89. The Government of India Act of 1919 has expressly given the Indian Legislature power to repeal or alter the jurisdiction, powers and authority of High Courts. See Schedule V.

writ of *habeas corpus* under common law it has been pointed out that section 82 of Act X of 1872 took away the power in regard to the *mufussil;* then in 1875, by Sec. 148 of Act X of 1875 power to make *an order in the nature of habeas corpus* for purposes mentioned in the section, within the limits of their original civil jurisdiction was given to the chartered High Courts, taking away at the same time the power to issue the writ of *habeas corpus* for those purposes. Thus by these two Acts, the power to issue the prerogative writ within the limits of the original jurisdiction of the High Courts for certain purposes, and without those limits for all purposes, was taken away. Next when the Criminal P. Code of 1882 was passed, the Acts of 1872 and 1875 were repealed but "not so as to restore any jurisdiction not existing." Then came the amendment of 1923 which by section 491, without altering the law in any way, only extended the power of making *an order in the nature of habeas corpus* for purposes mentioned in the section, to *all* the High Courts within their *appellate* jurisdiction.[90] Thus the result is that for purposes mentioned in section 491 of the Criminal P. Code, relief can be obtained only under that section and not through the prerogative writ under common law, but for purposes outside the scope of that section, the old writ may still be applied for within the limits of the original jurisdiction of the chartered High Courts. The relief by an application under section 491, is by clause (3) denied to persons detained under Bengal Reg. III of 1818, Madras Reg. II of 1819, Bombay Reg. XXV of 1827, and the State Prisoners Acts of 1850 and 1858, and, by the Bengal

90. The Criminal Appellate Bench has therefore now jurisdiction to entertain an application under sec. 491; see *Subodh* v. *King Emperor,* 29 C. W. N. 98 (100).

Criminal Law Amendment (Supplementary) Act of 1925, to persons detained under the Bengal Criminal Amendment Act of 1925. In the case of European British subjects unlawfully detained in custody by any person, an application may be made, under 456 of the Crim. P. Code, or if detained *outside* the limits of the appellate jurisdiction of the chartered High Courts, under sec. 491A.

In Extradition proceedings under the *Indian* Extradition Act (XV of 1903) it has been held [91] that the prisoner may apply for relief under sec. 491 of the Crim. P. Code, although there is no express provision for it in the Indian Extradition Act as in the English Act. In the case of *Rudolf Stallman* [92] Mookerjee, J., observes that a supreme right in the nature of *habeas corpus* given under sec. 491 cannot be supposed to have been taken away unless it is taken away *expressly* and the decision has been followed in later cases.[93]

Trial by Jury.—The liberty of the subject is secured in England and America by this institution which is an important feature of English common law, perhaps more than by any charter or statute. As observed recently by Mr. Charles E. Hughes, President of the American Bar Association, it is " at once a bulwark of freedom and an effective method of applying to infinitely varied states of fact within ordinary experience the common sense of the community." It has besides a high educative value on the people giving them what Mr. Hughes calls a priceless discipline in democracy.[94]

91. Stallman, *In re* Rudolf, 39 Cal. 164.
92. *Ibid.*
93. *A. C. Tops* v. *Emperor*, 46 Cal. 52.
94. Sec. 28 C. W. N. (notes), p. 194.

Difference in Jury Trial in England and in India. —There is considerable difference between the two systems. In England all indictable crimes, *i.e.*, all offences other than those triable summarily, must be tried with the aid of a jury, whereas in India, Local Governments have the power to declare in what districts there will be jury trial and where trial will be with the aid of assessors;[95] in the former again, it is only in the case of the more serious offences, triable in Courts of Sessions, that the trial is to be with the aid of a jury. In England, the number of jurors in criminal cases, is always 12, while in India it varies from 9 to 5. But by far the most important difference is that in England the verdict must be unanimous, or else there is to be a fresh trial with a new jury; but in India, the judge can accept a divided verdict—in the High Courts, if it be a majority verdict of six to three, and in the Court of Sessions, a verdict of any majority; the Sessions Judge can disagree with the verdict even if it be unanimous, and in all cases of disagreement, has to refer the case to the High Court for disposal.[96] Thus in England the unanimity of the verdict makes jury-trial a real trial by fellow citizens whose unanimous opinion is regarded as conclusive of the guilt or innocence of the accused.[97]

95. See Sec. 269, Crim. P. Code
96. Sec. 307, Crim P. Code.
97. See *post* for effect of the Criminal Appeal Act of 1907.

CHAPTER VII.

LIBERTY OF DISCUSSION.

What is meant by liberty of discussion.—It means that one is free to say, write or publish anything so long as one does not break any law of the land ; in other words, so long as one is not guilty of (*a*) defamation, (*b*) sedition, and (*c*) blasphemy or obscenity. It is therefore necessary to know what constitutes the above offences.

On what is liberty of discussion based in England.—It is not based on any " fundamental " right embodied in a written constitution as in countries with rigid constitutions, nor is it anywhere defined or recognised either in common law or statute law but follows as a matter of course from the general supremacy of law that a man must take the consequences of his act if he breaks the law but otherwise he is free to do or say anything he chooses.[1]

What is defamation.—It is publication of any matter concerning a person either orally, *i.e.*, by words or gestures (slander), or in writing, print, pictures, engravings, etc. (libel), calculated to prejudice him in his calling or trade, or, to hold him up to ridicule, contempt or hatred.

Definition of defamation in I.P.C.[2]—Whoever by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any

1. See Dicey, Ch. VI.
2. Sec. 499, I. P. C.

imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in cases hereinafter excepted, to defame that person. The exceptions are: (1) *true* statement for public good, (2) regarding public conduct of public servants, made in good faith, (3) about conduct of any person regarding a public question in good faith, (4) *true* report of proceedings in Court, (5) merits, or conduct of witnesses, etc., in a case, *after* it is decided, (6) about merits of any work or performance in good faith, (7) censure passed in good faith by a person having lawful authority, (8) accusation in good faith to person in authority, (9) imputation in good faith for protection of one's or another's interest, (10) caution in good faith for good of person to whom conveyed or for public good. (1) and (4) must be true, and the rest in good faith. A defamatory statement, on oath or otherwise, by a party to a judicial proceeding falls within section 499, I. P. C., and is not absolutely privileged.[3]

Difference between libel and slander.—Libel is—(*a*) Defamation in some permanent form as in writing, print, etc. (*b*) It is both a criminal offence and a civil wrong; libel however is crime under English law only if it tends to create a breach of the peace; and (*c*) it is actionable *per se*, as law presumes damage. Slander is—(*a*) Defamation by words or gestures. (*b*) Not a criminal offence in England [4] except in a few cases, *viz.*, if it is (1) seditious, (2) blasphemous, (3) obscene, (4) abuse of either House of Parliament *en bloc* or of Parliament generally, (5) abuse of High Court Judges, (6) abuse of any member of

3. *Satis Ch. Chakravarti* v. *Ram Doyal*, 48 Cal. 388 (F. B.)
4. Otherwise in India; see sec. 499, I. P. C.

Parliament touching his calling in life, and, (7) solicitation to commit a crime; and (c) not actionable *per se* but only on proof of special damage, except in a few cases, *viz.*, when the abuse (1) amounts to a charge of criminal offence punishable with imprisonment, (2) imputes an infectious or contagious disease, (3) is in relation to one's trade, profession or business which manifestly tends to prejudice one in his calling, and (4) when unchastity or adultery is imputed to a woman.[4A] Prior to the Slander of Women Act of 1891 (54 and 55 Vic., Ch. 51) slander of women was not actionable *per se* in England, without proof of special damage. To guard against frivolous suits there is a proviso in the Act that the plaintiff shall get no costs unless the Judge certifies that there was reasonable ground for bringing the action. In **India** there is a great anomaly in regard to such suits. In the three Presidency towns, such an action is not maintainable without proof of special damage, whereas in the *mufussil*, it is.[4B] The reason for the difference is that since the establishment of the Mayor's court by the Charter of 1726 (13 Geo. I) English law Common law and Statute law (as it existed in English prior to 1726) has been applied to Indians,[4C] living within such limits; but in regard to the mufussil where English law was not introduced, cases when not provided for by the Indian Legislature, have to be decided according to rules of "justice, equity and good conscience." Legislation in India on the lines of the English Act will not only remove the anomaly but also alter the archaic law current in the Presidency towns.

4A. Slander of Women Act, 1891 (54 and 55 Vic., Ch. 51).

4B. *Bhooni Mony* v. *Natobar*, 28 Cal. 452; *Sukan Teli* v. *Bipad Teli*, 34 Cal. 48.

4C. See *Advocate-General* v. *Ranee Surnomoyee*, 9 M. I. A. 387 (426).

Essentials of libel.—(1) Publication; publication means communication to some person other than the person defamed, for "you cannot publish a libel of a man to himself;"[5] and, (2) Falsehood. In *Pullman* v. *Hill and Co.*[6] the libel was contained in a letter to members of a partnership business sent in an envelope addressed to the firm. The letter was dictated to a clerk who took down the words in shorthand and then wrote them out in full by means of a typewriter and was copied by an office boy in a copying press. When it reached its destination it was opened in the ordinary course of business by a clerk of the firm and was read by two other clerks. The defence was there was no publication and if there were, the occasion was privileged. It was held that as there was no duty or interest in making the communication to the typewriter, nor any interest in the typewriter in receiving it, the letter must be taken to have been published both to the plaintiff's clerks and defendant's clerks, and that neither occasion was privileged.

Defences to an action of libel.—(1) *Truth* of the imputation. In a civil action for tort, truth of the imputation is a complete defence as court will not allow damages to a man where he does not really possess the character; motive in such cases becomes irrelevant. In a criminal charge, truth alone is no justification unless the publication was for public good or for other just and proper cause.[7] (2) *Fair comment in matters of public interest.*[8] The criticism must be honest and fair and reasonable and not a cloak for malice. All matters which invite public attention or criticism such as state

5. *Pullman* v. *Hill and Co.*, (1891) 1 Q. B. 524, at p. 527.
6. (1891) 1 Q. B. 524.
7. See definition of defamation in I. P. C.
8. See *Wason* v. *Walter*, L. R., 4 Q. B. 73; see also *Merivale* v. *Carson*, 20 Q. B. D., at p. 280.

matters, public conduct of public men, legal matters, public amusement, literature, journalism, art and so on are matters of public interest.[9] (3) *Privilege* which is either absolute or qualified. (*a*) *Absolute privilege* arises when on grounds of public policy, a man should speak out his mind freely without fear of consequences; existence of malice is perfectly immaterial in such cases. Absolute privilege exists—(*a*) In regard to *Parliamentary proceedings*;[10] words spoken in parliamentary debates or proceedings however false or malicious are not liable to any action for libel. Freedom of speech in debates or proceedings in Parliament were declared by the Bill of Rights. Reports, etc., published by order of either House are also now absolutely privileged.[11] (*b*) In regard to *judicial proceedings*; words written or spoken in course of a judicial proceeding before any court of competent jurisdiction by Judge, Jury, Counsel, witnesses, parties, etc., however malicious or without justification and from personal ill-will or anger, would not be actionable.[12] A military or naval court of enquiry is also a court recognised by law and so it was held in the case of *Dawkins* v. *Lord Rokeby* [13] no action for libel or slander would lie for words spoken in the ordinary course of military or naval proceedings before such courts of enquiry. In *Dawkins* v. *Lord Paulet* [14] which was also an action for defamation, it was laid down that Civil Courts

9. See Fraser on Tort, pp. 151-152.

10. *Cf.* sec. 72D, cl. 7, of the Government of India Act of 1919.

11. As a consequence of the case of *Stockdale* v. *Hansard*, Acts 3 and 4 Vic., c. 9, was passed under which production of a certificate from the Lord Chancellor or Clerk or Speaker of Parliament that the publication was under authority of either House will stay all proceedings in a Court of Justice.

12. (1892) *Royal Aquarium Co.* v. *Parkinson*, I. Q. B., at p. 451; see *Munster* v. *Lamb*, 11 Q. B. D. 588 (1883).

13. (1875) L. R. 7 H. L. 744.

14. L. R. 5 Q. B. 94.

cannot interfere in grievances arising out of military duties between persons both subject to military law, and the principle was affirmed by the Court of Appeal in *Marks* v. *Frogley*.[15] As regards the privilege of advocates, the law seems to be somewhat different in **India**, where they do not enjoy such unqualified privilege as they do in England. In *Sullivan* v. *Norton* [15A] it was no doubt held that at least within the limits of the original jurisdiction of the chartered High Courts, the common law of England would apply and an advocate could not be proceeded against civilly or criminally for words uttered in his office as advocate. But as pointed out by the Bombay High Court [15B] an advocate would nevertheless be amenable to the disciplinary jurisdiction of the High Court under cl. 10 of the Letters Patent. The trend of later Indian cases [15C] however is that apart from liability to such disciplinary jurisdiction, an advocate is also liable to be prosecuted or sued for defamation at the instance of a party, if the circumstances clearly show that the defamatory statements were made wantonly or from malicious or private motive; but, in the absence of such circumstances, courts should presume that the statements were made in good faith, on instruction, and for the protection of his client's interest. (*c*) *Fair and impartial reports in newspapers, of judicial proceedings* are protected by statute as well as by common law.[16] The Law of Libel Amendment Act 1888 (51 and 52 Vic., c. 64, s. 3)

15. L.R. 55 Q.B., at p. 272; see Thomas's L.C., p. 130.

15A. 10 Mad. 28 (F.B.)

15B. *Bhaishankar* v. *Wadia*, (1899) 2 Bom. L.R. 3 (F.B.); see also Sec. 150 of the Evidence Act.

15C. See *Weston* v. *Das*, 40 Cal. 498; *McDonnell* v. *King Emperor*, I. L.R. 3 Rang. 524; *Fakir* v. *Kripasindhu*, 54 Cal. 137; *M. Banarjee* v. *Anukul*, 31. C. W. N. 127 (notes).

16. See Thomas's L. cases (5th Edn.), p. 159, note,

enacts that a fair and accurate report in *any newspaper* of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, except blasphemous and indecent matter, be privileged. (*d*) *Faithful and correct report of parliamentary proceedings* is also privileged on the same principle as publication of reports of the proceedings of Courts of Justice as was held in the case of *Wason* v. *Walter.*[17] Garbled or partial report would not be protected if published with intent to injure individuals.[18] It is doubtful if (*c*) and (*d*) are absolutely privileged or privileged in a qualified sense.[19]

(*b*) *Qualified privilege* : When it is shown that there was interest or duty in making the communication and that it was not actuated by malice, the communication is said to be privileged in a qualified sense. Qualified privilege arises : (*a*) where duty, legal, moral or social is cast on a person making the communication,[20 21] (*b*) in communication made in self-defence ;[22] (*c*) where there is mutual interest in making and receiving the communication ; [23] (*d*) in reports of judicial proceedings not covered by Sec. 3 of the Law of Libel Amendment Act, 1888 ; and (*e*) in fair and accurate reports in any newspaper of the proceedings of a public meeting or of town council or other public body mentioned in Sec. 4 of the Law of Libel [24] Amendment Act, 1888. In case of qualified privilege proof of malice would entitle the plaintiff to damages.

17. (1868) L. R., 4 Q. B. 73; see Th. L. C., p. 157.
18. *Ibid;* see Thomas's L. C., p. 158.
19. See Thomas's L. C. (5th Edn.), p. 160.
20-21. See *Stuart* v. *Bell*, (1891) 1. Q. B. 530.
22. See *Koenig* v. *Ritchie*, (1862) 3 F. and F. 413.
23. *Hunt* v. *G. N. Railway*, (1891) 2 Q. B. 189 (191).
24. See Thomas's L. C. (5th Edn.), note, pp. 161-162.

(4) *Apology* : This is an additional (statutory) defence for the benefit of newspapers and periodicals, under Lord Campbell's Act (6 and 7 Vic., c. 96, ss. 1 and 2) as amended by 8 and 9 Vic., c. 75. Under the Act the defendant has to prove (1) that the libel was published without actual malice or gross negligence; (2) that at the earliest opportunity he inserted a full apology, and (3) by way of amends paid a certain sum of money into court at the time the plea was filed.[25]

Liberty of the English Press.—It is a most valued right but nowhere recognized as a distinct principle of law but follows like other rights from the general supremacy of law. More than anything else the Press has kept the lamp of liberty and freedom bright in England and without the freedom of the Press British freedom would have no guarantee. Justice Fitzgerald in addressing the jury in *R.* v. *Sullivan* [26] in which the accused was charged with sedition, said " you should recollect how valuable a blessing the liberty of the press is to all of us, and sure I am that that liberty will meet no injury, suffer no diminution at your hands." It consists in (*a*) being able to print anything without previous license, *subject* of course, to the consequences of law, save and except in regard to the licensing of plays; (*b*) press offences being dealt with like other offences by ordinary courts, *i.e.*, by judge and jury and not by any special tribunal; and (*c*) in the grant of special statutory defence by way of apology. In the 16th and 17th centuries things were different even in England. No one could print except with previous license; press offences were

25. See Fraser on Tort, p. 175.
26. 11 Cox 44 (Ir).

exclusively triable by the Star Chamber and book trade was a monopoly of government.[27]

What is meant by liberty of the press.—Liberty of the press therefore means the complete freedom to write or publish without censorship or restriction so long as one does not break the law of libel, sedition, blasphemy or obscenity. Lord Mansfield likened a seditious and licentious press to Pandora's box—the source of every evil.

Censorship of plays.[28]—This is the only exception in regard to licensing. Under the Theatres Act, 1843, Lord Chamberlain has powers (*a*) to prohibit any stage play, (*b*) to forbid the performance of unlicensed plays and to license all theatres in London and other places.

Blasphemous libel.—Blasphemy is defined by Justice Stephen as publication of any matter relating to God, Jesus, the Bible or the Book of Common Prayer intended to wound feelings of mankind, to excite contempt and hatred against the Church, or to promote immorality.[29] There is exception in regard to publication in good faith of opinions on religious subjects.

Sedition and seditious libel.—This has been dealt with elsewhere.[30]

Law in regard to decency and morals.—Writing, making and publishing of obscene books, pictures, etc., is a misdemeanour. Purity of motive is no excuse. Exhibition is an offence and not mere possession unless it be for sale, distribution or public exhibition.[31] In the

27. See Dicey, p. 255 *et seq.*
28. See Ch. and As., p. 53.
29. Quoted in Ch. and As., p. 53; *cf.* Sec. 298, I. P. C.
29A. An Act of rather doubtful utility for the protection of Religions has been passed by the Indian Legislature in September, 1927.
30. See *post*, Ch. IX.
31. *Cf.* Secs. 292-293, I. P. C., as amended by the Obscene Publications Act of 1925.

I. P. C. an exception is made in the case of representations, etc., in temples for religious purposes. Search warrants may be issued for seizure of obscene books, pictures, etc., intended for gain and after notice to show cause, may be destroyed.[32] The Post Master General may, with the consent of Treasury, make regulations for stopping transmission of indecent documents.[33]

32. *Cf.* Sec. IX.
33. 20 and 21 Vic., c. 83 S. I.

CHAPTER VIII.

RIGHT OF PUBLIC MEETING.

On what is based the right of public meeting in England.—There is no such *public* right recognised either by common law or statute. It follows from individual liberty of person and individual liberty of speech. As pointed out by Dicey,[1] A. B. C. to an indefinite number has individually the right to go to any public place and to say anything so long as law is not broken, and from this follows the right of public meeting and the liberty of association for any lawful object such as to form a club, society or partnership without any special leave or license from government. That English constitution is built up upon individual rights is well illustrated, says Dicey, by the rules as to public assemblies.[2] On the one hand there is no specific right to hold public meetings or meetings in public places, on the other, no power or discretionary authority in the executive or government to disperse a lawful meeting. If such a meeting be forcibly dispersed there is no collective remedy, there being no invasion of any public right but the members of the meeting may individually resist personal violence within the limits of the right of self-defence or bring actions for assault, unlawful restraint and so on. Of course if the assembly be an unlawful assembly or commit rout or riot or breach of the peace it may be lawfully

1. See Dicey, Ch. VII.
2. Dicey, p. 267.

dispersed by the authorities. It is therefore necessary to know what constitutes an unlawful assembly and what is meant by rout and riot.

Unlawful assembly.[3]—It is an assembly of three or more persons whose common object is to do some illegal act or some lawful act by illegal means. An assembly which at its inception was lawful may become unlawful subsequently. The **Indian** Criminal Law (Amendment) Act No. XIV of 1908 has given large powers to the executive, for it confers on the Governor-General in Council the power to declare by notification in the official Gazette, any association as unlawful which in his opinion, interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace. The objectionable feature of the legislation is that it makes the declaration rest not upon the decision of a court of justice arrived at after shifting the evidence in the presence of the accused persons, but upon the *ex parte* opinion of the Governor-General in Council.

Rout.—It is a disturbance of the peace by persons assembling together with an intention to do anything which, if it be executed, will make them rioters, and who actually make a motion towards the execution of it. It is a misdemeanour under common law.

Riot.—It is a tumultuous disturbance of the peace by three or more persons assembled without lawful authority with the common intent to assist one another against anyone opposing them in the execution of any enterprise lawful or unlawful *and* afterwards actually beginning to execute the same in a violent and turbulent manner to

3. *Cf.* Sec. 141, I. P. C.

the terror of the public. It is also misdemeanour at common law.

Difference between Rout and Riot.—Rout is the preliminary step prior to actual execution. Rout becomes riot when (*a*) the number is three or more men, (*b*) there is a common object and (*c*) there is actual use of force or violence.[4]

Affray.—It is a sudden breach of the peace without any common intent; if there is a common intent it becomes riot.

Duty and right of putting down riots and disorder.—The duty primarily rests with the local civil authorities and use of force is justified only at the critical moment, but if the situation becomes serious, military force may be resorted to.[4A] In common law the right to repel force by force so as to restore peace and order belongs not only to the crown and its servants but to every citizen, but with this important reservation that no one whether public authorities or private citizens, is entitled to use more force than is necessary. On the one hand, use of force in such circumstances is essential for the very existence of society or good government and on the other, "if persons were not compelled to act on such occasions according to law there would again be an end of society."[5] In *Rex* v. *Pinney*[6] which arose out of the Bristol riots in 1831 and in which the mayor was prosecuted for alleged negligence, but was acquitted, mainly on the ground that he had not sufficient civil or military

4. *Cf.* the difference between unlawful assembly and rioting in I.P.C.

4A. *Cf.* Secs. 130 and 131, Crim. P. Code. Under Sec. 393 of the Regulations for the Army in India, the military authorities are bound to comply with the requisition of the civil authorities.

5. *Rex* v. *Pinney*.

6. 3 St. Tr. (N.S.) 11; 5 C. and P.p. 254.

force at his disposal, Littledale, J., in his charge to the jury said " the local authority is bound to hit the exact line between excess and failure of duty, and the failure of so doing.........is no legal defence." It is not only the right but the duty as well, of every citizen to suppress breach of the peace or riot, and refusal to aid a police officer is an offence.[7] Public order is to be maintained at whatever cost of blood or property. On the other hand, excessive or cruel measures would be punishable.[8] It is the right and duty of every one, military or civil authorities or citizens, to use just so much force as is sufficient to overcome illegal violence of the rioters *but no more.* In regard to officers and soldiers acting under orders of superiors, the *dictum* of Willes, J., in *Keighly* v. *Bell*[9] " that an officer or soldier acting under orders from his superior *which are not necessarily or manifestly illegal* would be justified " has been approved and followed in other cases.[10] Thus in England under common law everyone official or non-official, military or civil, acting in excess of his powers is liable not only to be sued for damages but to be criminally prosecuted, *i.e.*, is subject to both civil and criminal liability. In **India** persons engaged in dispersing unlawful assemblies and in suppressing riots enjoy much greater statutory immunity from criminal responsibility.[11] Section 132 of the Criminal Procedure Code says in the first place that no prosecution in such cases can be started without previous sanction of the Local Government, and in

7. (1841) *R.* v. *Brown C. and Mar.* 314; *cf.* Crim. P. C., Sec. 42.
8. (1799) *Wright* v. *Fitzgerald*, 27 St. Tr. 765.
9. (1866) 4 F. and F. 763.
10. *E.g.*, *Rex* v. *Smith*, (1900) 17 C. G. H. Rep. 561, Thomas's L.C. (5th Edn.), p. 135. By the Mutiny Acts and by the Articles of War a soldier is only bound to obey *lawful* orders.
11. See Sections 128, 130, 132 and 197, Crim. P. Code; see *post.*

the next place, that it is no offence for an inferior officer, or soldier, or volunteer to do an act in obedience to any order which he was bound to obey. In the *O'Dwyer-Nair libel case* Justice McCardie in his judgment observed that a military or police officer in dispersing unlawful assembly would be justified in taking measures calculated to produce a *moral* effect on other persons contemplating disorder *elsewhere*. Such views are wholly contrary to the principle of strict necessity hitherto followed in England and Lord Olivier, the then Secretary of State for India, immediately afterwards published a despatch dissociating His Majesty's Government from the views of the learned judge.[12]

The Riot Act (I Geo. I, St. 2, c. 5).—The reading of the Act is not necessary to constitute riot. The reading cannot make that riot which was not so before. The reading gives the rioters an opportunity to disperse and under the Act makes the rioters who are already guilty of misdemeanour, guilty of the more serious offence of felony [13] if they, to the number of 12 or more, continue together for one hour after the proclamation to disperse, or if they oppose the reading of the proclamation. The reading of the proclamation does not clothe the soldiers who are called in to suppress a riot with any higher rights or immunities and who therefore remain responsible as before for any casualty that may ensue by reason of their

12. *See Gazette Extraordinary*, Sept., 1924.

13. *Felonies and misdemeanours.*—All indictable crimes below the degree of treason are either felonies or misdemeanours. Felonies are crimes which are such by common law or Statute; police officer can arrest without warrant; non-compoundable and not bailable as a matter of right. Misdemeanours are all crimes which are neither treason nor felony under C. L. or statute; police officer cannot arrest without warrant and are bailable. The difference is more or less the same as between cognizable and non-cognizable offences under the I. P. C.

acting not strictly according to law. Thus it is entirely different from the proclamation of *etat de siege* in France and other continental countries which for the time being suspends ordinary law and invests the soldiery and the executive with arbitrary powers. In the Featherstone commission in 1893 where the conduct of the officer was in question, who had ordered the soldiers to fire on the mob and a bystander behind the mob was killed, the Report stated that the degree of force used must be proportional to the circumstances of each particular riot and the two main questions for consideration are : (*a*) was firing necessary and (*b*) was it carried out with due caution.

Does a meeting lawful in itself become unlawful by reason of the possibility or probability of others committing a breach of the peace?—The question was answered in the negative in the case of *Beatty* v. *Gillbank's*[14] and in *Queen* v. *Justices of Londonderry*[15] where the former case was considered and approved. In *Beatty* v. *Gillbanks* the local Magistrate had served a notice on the Salvationists not to assemble and in spite of that they did assemble and the rival party known as the Skeleton Army opposed them and there was a breach of the peace in consequence. Beatty, the leader of the Salvationists was convicted of being member of an unlawful assembly but the conviction was set aside on appeal by the Divisional Court. A meeting which is lawful cannot be stopped by order of Magistrate or Commissioner, *i.e.*, by an executive order. Interference with a lawful public meeting is however no invasion of *public* right, there being no such public right but only invasion of individual rights, and as such can be resisted individually within the limits of the right of self-defence.

14. (1882) 9 Q. B. D. 308 (314).
15. 28 L. R. (Ir). 440 (461-462).

Limitations to the rule laid down in *Beatty* v. *Gillbanks*.—The above rule is subject to the following exceptions : (1) If there is any illegality in the meeting itself which provokes others to a breach of the peace. This is really no exception for then the meeting is no longer a lawful meeting. (2) Even if there be nothing unlawful in the meeting itself but it nevertheless provokes a breach of the peace and it becomes impossible to maintain peace without dispersing the meeting and such a meeting continues even after order to disperse, it becomes unlawful. In *Wise* v. *Dunning* [16] it was held that under such circumstances a meeting lawful in itself can, from the *necessity of the case*, be dispersed. In *Wise* v. *Dunning*[17] the real question was under what circumstances a person may be bound down to be of good behaviour and so the case was different from that of *Beatty* v. *Gillbanks*.[18] Wise who was a Protestant lecturer held meetings in public places in the town of Liverpool and used language and gestures highly insulting to the Roman Catholics, the natural consequence of which was to cause breaches of the peace. The Magistrate bound him down to be of good behaviour for one year and on appeal it was held that the Magistrate had jurisdiction to bind down under the circumstances of the case. (3) The third limitation to the rule laid down in *Beatty* v. *Gillbanks* is that a lawful meeting can be stopped by order of the executive by virtue of some legislative enactment, *e.g.*, by the Prevention of Seditious Meetings Act of 1907 passed by the Indian Legislature.

Public meetings in public thoroughfares, parks, etc.—Under English common law there is no right of

16. (1902) 1 K. B. 167.
17. *Ibid.*
18. (1882) 9 Q .B. D. 308.

public meeting in a public thoroughfare as it is dedicated to the public as a means of passing and repassing and by analogy, also in a place of public resort like say, Trafalgar Square.[19] There are besides statutes and bye-laws under statutes such as the Municipal Corporation Act, 1882, or the Local Government Act, 1894 prohibiting such meetings in public thoroughfares and parks.

Religious and other processions in public streets in India.—The question whether religious and other peaceful processions have the right to pass along public thoroughfares in the neighbourhood of which there may be mosques, in other words, the question of *music before mosques* has, of late, given rise to considerable tension of feeling between the Hindus and the Mahomedans in **India,** ending on many an occasion in breaches of the peace and broken heads. It is therefore important to see what are the rights of the respective parties on such occasions. "In India there is a right to conduct religious procession with its appropriate observances through a public street, so long as it does not interfere with the ordinary use of the street by the public, and subject to any *lawful* directions by the Magistrate to prevent obstructions of the thoroughfare or breaches of the peace," so declared the Privy Council in a case [19A] between *Shias* and *Sunnis*, the latter interfering with the performance of 'matam' (wailing) near a mosque on the ground that it interfered with their devotions. The *Shias* brought a suit for declaration of their right to perform 'matam' and the suit was decreed by the Privy Council. Now on such occasions there may be a conflict of rights—the

19. *Dictum* of Charles, J., in *R.* v. *Graham and another*, 16 Cox 420 quoted in Ch. and Asq., footnote, p. 58.

19A. *Manzur Hasan and others* v. *Muhammad Zaman and others*, 52 I.A. 61; 23 A. L. J. 179 (P.C.) 47 All, 151; 29 C. W. N. 486.

right of the processionists to take their procession with music, etc., along public streets and the right of those engaged in *public* places of worship not to be disturbed in their devotions. The latter however, can claim such right only during appointed hours when, according to custom or practice, congregational or public worship is carried on. " No sect is entitled to deprive others for ever of the right to use public streets for processions on the plea of sanctity of their place of worship, or on the plea that worship is carried on there day and night." [19B] If such a plea were allowed, a particular sect, as observed in another case,[19C] might close every highway to such processions by erecting mosques at intervals in every thoroughfare. Now the duty of the Magistrate on such occasions is " to secure to every person the enjoyment of his rights under the law, and by measure of precaution to deter those who seek to invade the rights of others. It is only in extreme cases of *necessity* as pointed out in *Wise* v. *Dunning*, or, as observed by Turner, C. J., " if the Magistrate apprehends that the lawful exercise of a right may lead to civil tumult, *and* he doubts whether he has available a sufficient force to repress such tumult or to render it innocuous, regard for the public welfare is allowed to override *temporarily* the private right," [19D] that the Magistrate may disperse the procession although it be peaceful, provided there is no other means of preventing a breach of the peace. But he cannot pass any *general* order preventing citizens from exercising their legitimate rights, and an order directing that all music should cease whenever any procession is passing a certain place of worship would be illegal and *ultra vires*.

19B. *Sudam Chetti* v. *The Queen*, 6 Mad. 203 (F. B.)
19C. *Muthuali Chetti* v. *Bapun Saib*, 2 Mad. 140.
19D. *Ibid*.

Long usage or practice would be no justification for such an order.[19E]

Special statutes to prevent dangerous and mischievous meetings.[20]—By 37 Geo. III, c. 123, administering or taking oath or engagement to embark in any seditious or mutinous purpose, or to break the peace, or to belong to any society formed for such purpose, or to obey any leader or body of men not having any lawful authority for that purpose, or not to reveal any unlawful federation or combination, or any unlawful act done or to be done is felony. Unlawful drilling and meetings for that purpose are made punishable by 60 Geo. III and 1 Geo. IV, c. 1, s. 1. Disorderly conduct at a lawful public meeting is made punishable by the Public Meeting Act of 1908 (8 Edw. VII, c. 6). In 1907 the **Indian** Legislature passed an Act known as the Prevention of Seditious Meetings Act [20A] which has the most objectionable feature of vesting large powers on the executive who could by a notification prevent all public meetings of a political character except on previous notice to and permission by the Police.

19E. *Ibid.* See also the provisions in Ch. IX of the Criminal P. Code for dispersing unlawful assemblies.

20. See Ch. and Asq., p. 60.

20A. Act VI of 1907.

CHAPTER IX.

TREASON AND SEDITION.

Treason and sedition, a part of constitutional law.—The law of treason and sedition as affecting allegiance or the relation of the sovereign (state) and the subject forms as much part of constitutional law as of criminal law.

Development of the law of treason in England.—Treason originally meant a breach of the feudal bond or a violation of the allegiance which one owed to the sovereign. Now it includes offences not only against the sovereign but also against the state. The provisions in the Statute of Edw. III on which the English law of treason mainly rests only contemplated offences against the king's person, his sovereignty, his family relations, the *indicia* or representatives of the royal will or the privileges of royalty.[1] It was the feudal conception of treason, dealing only with offences of a personal character against the sovereign as distinguished from the State. In later times partly by extended meaning of the provisions of the Statute of Edw. III and partly by new statutory enactments the present English law of treason has been made to include also offences against the State. In republican countries like France or the United States, treason includes only offences against the safety and integrity of the State and not against the person of the Chief Executive. Thus killing the President would be

1. Anson, Vol. II, Pt. 1, 242-243.

murder and not treason. In the I. P. Code curiously enough there is no reference to any offence personally against the sovereign but surely any such offence would be punishable as treason under English law. Waging, attempting to wage war and abatement thereof is made punishable under I.P.C. with death or transportation for life and forfeiture of property (Sec. 121, I. P. C.) and conspiracy to commit any offence under Sec. 121, even without any overt act, is made punishable under sec. 121A.[1A]

Present English law of treason.—The Treason Act of Edw. III as extended by subsequent Acts and interpretations make the following offences treason under English law:—

(1) Compassing or imagining the death of the King or the Queen, or of the King's wife during the King's life or of the King's eldest son and heir (25 Edw. III Treason Act of 1351); compassing or devising, etc., any bodily harm tending to death or destruction, maiming or wounding, imprisonment or restraint of the person of the King, his heirs and successors (Treason Act of 1795). Compassing or imagining must be proved by some overt or open acts. Mere idle words would not be treason but writings even when unpublished were formerly held to be treason.[2] To do or attempt to do any act by which the King's life may be endangered, such as to enter into measures for deposing or imprisoning would come under this provision.

(2) Levying war against the King in his realm (25 Edw. III)—Levying of war may be either express and

1A. See *Emperor* v. *Lalit*, 38 Cal. 559.

2. *R.* v. *Peacham*, (1615) 2 St. Tr. 870; *R.* v. *Sidney*, (1683) 9 St. Tr. 817.

direct or constructive as where there is a rising for an object of a public or general nature such as to effect an alteration of the law, to reform religion, redress grievances, to open all prisons, burn down all meeting houses and so on.[3] But a rising in support of a private claim of right would not be so.[4]

(3) To adhere to King's enemies or giving them aid or comfort in the realm or elsewhere,[5] would be treason. In *R.* v. *Casement*,[6] the accused Sir David Casement was convicted and sentenced to death for adhering to King's enemies while he was in the German Empire, and the contention on his behalf in the Appeal Court that he must be within the realm at the time was not given effect to, Darling, J., observing that allegiance followed the subject where he may happen to be.

(4) To endeavour to deprive or hinder the person next in succession from succeeding to the crown, or maliciously or advisedly to affirm in writing or printing that other person has a right to the crown.[7]

(5) To violate the King's wife during his life, or the wife of his eldest son during coverture, or the King's eldest daughter, being unmarried.[8] Now, it may be treated as felony under 24 and 25 Vic., cc. 98-100.

(6) To counterfeit the King's Seal or money or to import false money (Edw. III), and

(7) to kill the Chancellor, Treasurer, King's Justices of either Bench or of Assize, in the discharge of

3. *R.* v. *Damaree*, 15 St. Tr. 522 (606); *R.* v. *Purchase*, *ibid*, 651 (699).

4. See Hal., Vol. IX, p. 453.

5. 25 Edw. III.

6. *R.* v. *Lynch*, (1903) L. R. 1 K. B. 444; *R.* v. *Casement*, (1916) 12 Crim. App. Rep. 99 (119).

7. Treason Act of 1702.

8. 25 Edw. III.

his office (Edw. III). These last three offences although they remain on the Statute book as treasons, may now be dealt with as felony.[9]

Incidents of treason.—Treason wherever committed by a British subject is triable in England like murder and bigamy and is an exception to the Anglo-American rule that 'all crime is local.' There are no accessories in treason, they being regarded as principals. Trial, except where the object is to assassinate the King, must be within three years. Treason is also called High Treason in contrast to an offence which at one time was called *petit* treason and which consisted in the killing of a master by the servant, or of husband by the wife and so on. Formerly the punishment for treason was "to hang, draw and quarter," together with forfeiture; now it is only death by hanging, the other penalties being abolished by the Felony Act of 1870. For conviction of treason there must be at least two witnesses. If only one witness is available the accused is either prosecuted for sedition as in the case of *Hampden*[9A] who took part in the Rye House plot of the Whigs to murder Charles II and James, or is attainted by an *ex post facto* Act of Parliament as in the case of *Sir John Fenwick*[9B] who plotted the assassination of William III.

Who may be guilty of treason.—As treason is a violation of allegiance, not only those who owe natural allegiance but those who owe acquired or local allegiance may also be guilty of treason. Aliens who have become naturalised British subjects,[10] or who reside in the

9. 24 and 25 Vic., cc. 98-100; see Anson, Vol. II, Pt. 1, p. 243.
9A. 9 St. 1853.
9B. The Law Times, quoted in C. W. N. Vol. XXIX, p. 150 (Notes).
10. *R.* v. *Ahlers*, (1915) 1 K. B., p. 616.

country without being naturalized and even enemy aliens so residing may be guilty of treason but not an enemy alien coming openly to make war or invade.[11]

A British subject cannot divest himself of his allegiance by being naturalised in a State already at war with England and if so naturalised may be guilty of treason and such an act of naturalisation would itself be an act of treason.[12] Ambassadors and persons attached to embassies cannot be guilty of treason by reason of the fiction of exterritoriality, under which they do not owe temporary or local allegiance to the State to which they are accredited. It is of course otherwise in the case of British subjects, natural-born or naturalised, who act as ambassadors or consuls to a foreign State.[13]

Misprision of treason.—Mere general knowledge of treason and concealment of it without any assent thereto constitutes misprision of treason and is punishable with imprisonment for life and forfeiture of goods and profits of lands for life. It is therefore essential that anyone coming to be aware of treason should at once reveal it to the authorities. The only exception is in the case of married woman knowingly receiving husband who has committed treason.

Treason Felony.—By the Treason Felony Act of 1848 (11 and 12 Vic., c. 12) the following offences constitute treason felony :—compassing, imagining, etc., expressed by publishing any printing or writing or by any overt act or deed either within or without the United Kingdom (1) to depose the sovereign, his heirs and successors, (2) to

11. Case of *Perkin Warbeck*.
12. *R.* v. *Lynch*, (1903) L. R. 1 K. B. 444.
13. See *R.* v. *Ahlers*, (1915) 1 K. B. 611.

levy war within the United Kingdom, to make the sovereign change his counsels or to intimidate or overawe either House of Parliament, and (3) to incite foreigners to invade the realm or any of the King's dominions. Punishment may be from imprisonment for two years up to penal servitude for life. Thus all the acts and compassings which did not tend to the death, personal injury or personal restraint of the sovereign were made treason felony under the Act,[14] and so not necessarily punishable with death.

Assaults on the King.—By the Treason Act of 1842 (5 and 6 Vic., c. 51) assaults on the king by discharging or attempting to discharge a firearm at the king or by wilfully striking or attempting to strike him or by throwing any substance, etc., are made high misdemeanours, punishable with penal servitude up to seven years.[15] Such offences can also be treated as treasons under the Treason Act of 1351 or 1795.

What is sedition.—It is the attempt: (*a*) to bring into hatred or contempt the sovereign or the Government established by law or either House of Parliament; (*b*) to incite any person to commit any crime in disturbance of the peace; or (*c*) to raise discontent or disaffection amongst His Majesty's subjects; or (*d*) to promote feelings of ill-will and hostility between different classes.[16] In the words of Fitzerald, J., in *R.* v. *Sullivan*[17] adopted by Cave, J., in *R.* v. *Burns and others*[18] "sedition embraced all those practices whether by word, deed or writing

14. Anson, Vol. II, Pt. I, p. 244.
15. See Hal., Vol. IX, p. 459.
16. See Stroud.
17. 11 Cox. 44.
18. 16 Cox 355.

which are calculated to disturb the tranquillity of the State and lead ignorant persons to endeavour to subvert the government and laws of the empire." "It is a crime against society nearly allied to that of treason and it frequently precedes treason by a short interval."

Seditious conspiracy.—Every person is guilty of the common law misdemeanour of seditious conspiracy who agrees with some one else (not being his or her wife or husband) to do any act for the furtherance of a common seditious intention.[19]

Seditious libel.—Every person is guilty of the common law misdemeanour of seditious libel, if with seditious intention, he either speaks and publishes any words or publishes a libel.[20] In civil cases libel is restricted to permanent representations by writing, print, etc., but in criminal cases words spoken may amount to a seditious libel.

Essence of sedition.—The definition is very wide and elastic and may possibly include cases where really no offence is committed as happened in the *Dean of St. Asaph's case*[21] where an imaginary dialogue between a farmer and scholar pointing out the then existing defects in the system of Parliamentary representation written by Mr. afterwards Sir William Jones and published by his brother-in-law (wife's brother), the Dean, formed the subject of an indictment for sedition. Of course now-a-days the safeguard lies in an enlightened jury who would never think of returning a verdict of guilty where the real essence of the offence, *viz.*, a criminal intention, is wanting. "Bring twelve men from among the people

19. Hal., Vol. IX, p. 460.
20. *Ibid.*
21. 28 St. Tr. 847.

and ask them if the writings have exceeded the limits, and if they say yes, then convict me." This seems the safest criterion, far better than any academic discussion. The freest public discussion, comment, criticism and censure either at meetings or in the press in relation to all political or party questions, all public acts of the servants of the crown, all acts of the government and all proceedings of Courts of Justice are permissible, but the criticism or censure must be without malignity and must not impute corrupt or malicious motive.[22] The *intention* with which the words were spoken or written forms the essence of the offence but the character of the words may form irresistible evidence of the nature of the intention.[23]

Indian law of sedition.—Sedition is defined in Sec. 124A of the I.P.C. as attempt to bring into hatred or contempt or to excite disaffection towards His Majesty or the Government as established by law in British India by words either spoken or written or by signs, or by visible representation or otherwise; and, by way of explanation it is said that disapprobation of any measure or action of government without exciting or attempting to excite contempt, hatred or disaffection does not amount to sedition. As explained by Strachey, J., in *R.* v. *Balgangadhar*[24] disaffection means hatred, enmity, hostility, contempt and every form of ill-will to government established by law in British India, in one word, disloyalty. "One may express the strongest condemnation of Government measures, and he may do so severely and even unreasonably, perversely and unfairly." But he must not do so with the intention to

22. Hal., Vol. IX, p. 460.
23. *Ibid*, p. 461.
24. I. L. R. 22 Bom 112.

excite feelings of enmity to the Government established by law in British India. As in English law so also under the Indian Penal Code the essence of the offence of sedition lies in the intention of the writer. In several recent cases in the Calcutta High Court it has been laid down that the gist of the offence under sec. 124A, I.P.C., lies in the intention of the writer which is to be gathered not from isolated or stray passages here and there but from a fair and generous reading of the article.[24A] Further, the distinction between Government and individual officers of Government is also important. Words calculated to produce hatred or contempt of individual officers may infringe the law of libel, but would not constitute sedition.[24B] The English law of sedition is much wider than the Indian law. Under the I. P. C. the punishment may extend up to transportation for life or to imprisonment up to three years whereas under the English law the punishment is imprisonment without hard labour up to 2 years.

Seditious meeting.—"A meeting lawfully convened may become an unlawful meeting if during its course seditious words are spoken of such a nature as to produce a breach of the peace. And those who do anything to assist the speakers in producing upon the audience the natural effect of their words will be guilty of uttering seditious words as well as those who spoke those words.[25]

Other offences against the State.—There are various other offences against the government* which

24A. *Per* C. C. Ghosh, J., in *Gopal* v. *King Emperor*, 46 C. L. J. 156; *Emperor* v. *Satyaranjan Baksi*, 45 C. L. J. 638.

24B. See *Raj Pal* v. *The Crown*, I. L. R., 3 Lah. 405 (412).

25. *Per* Cave, J., in *R.* v. *Burns and others*, 16 Cox 355.

are made punishable either under statute or under common law. Thus, inciting soldiers and sailors to mutiny (7 Geo. III, c. 70; *cf.* sections 131 and 132, I. P. C.), acts declared as offences under the Official Secrets Act of 1911, *e.g.*, approaching for a purpose prejudicial to the State any place declared as a prohibited place such as arsenal, munition works, fort, etc., or making sketches of prohibited documents and so on;[26] acts which are declared offences under the Official Secrets Amendment Act of 1920, *e.g.*, wearing unauthorised uniform or making false declaration for the purpose of gaining admission to a prohibited place, acts declared as offences under the Dockyards Protection Act of 1772, etc., are some examples of other offences against the State.

26. See Ch. and Asq., p. 77; *cf. Indian Official Secrets Act*, XIX of 1923.

BOOK III.

The Crown.

CHAPTER X.

THE SOVEREIGN.

Present position of the sovereign of England.[1]**—** Theoretically the king is still the supreme head of the State. The working of the entire machinery of the State consisting of the legislature, the judiciary and the executive is theoretically in the hands of the King. Legislation is the work of the Crown in Parliament, adjudication, the work of the Crown in courts and administration, the work of the Crown through its ministers. There was a time however when all this was not only theoretically but to a very large extent literally true. The king could make, unmake, suspend or dispense with laws, levy money or raise taxes, remove judges at will and interfere with administration of justice, appoint ministers of his own choice and carry on administration through his council of chosen ministers. All this has now been changed. The theory of divine right of kings received its *quietus* with the exit of James II. The greatest change in modern times in the English constitution has been the shifting of the supremacy from the Crown to Parliament.[2] Walter Bagehot speaking

1. See *post*, Ch. XIV, under "The Executive in relation to the Crown."
2. Dicey.

of Queen Victoria, though in a somewhat exaggerated vein, says "she must sign her own death warrant if the two Houses unanimously send it up to her." In legislation, though possessing the right of veto, no sovereign has exercised the right since the days of Queen Anne. The judges now no longer hold office at king's pleasure but during good behaviour removable only on a joint petition by both Houses of Parliament. The Ministers are appointed practically by the party commanding majority in the House of Commons without any reference to the personal wishes of the sovereign and they are responsible to the House as representing the nation. Since the Revolution, the power of the purse and the power of the sword have both been taken away; royal prerogative has been curtailed, defined and regulated by statutes and whatever is left of it is exercised, except the purely personal ones, by the cabinet or the leading party in the House of Commons; and, by conventions, the prerogatives are now exercised in such a manner as to give effect ultimately to the will of the nation. The king is thus now more a titular figurehead in a constitution which is essentially that of a republic and "once the master is now but the minister of his Ministers."

There is however a reverse side to this picture. It does not mean that the English sovereign is now "a mere piece of mechanism" or an absolute nonentity, or that "Monarchy in England is a convenient hypothesis." Inspite of the transference of the prerogatives from the crown to the Ministers, the king still holds as a reserve power in his hands the prerogative to appoint and dismiss his ministers, besides possessing

3. Anson, Vol. II, p. 49.

the undoubted prerogative to advise and influence the Ministers in their deliberations. Thus the sovereign wields considerable moral influence, however vague and indefinite its character may be, over the affairs of the state. With the unique position of the king clothed with supreme sovereignty and pre-eminence, his undoubted threefold rights in the words of Bagehot,[4]—"the right to be consulted, the right to warn and the right to encourage," his aloofness from all parties, his being "the instrument without whose intervention Ministers cannot act," the only visible symbol of the union of the empire and the object of personal affection and loyalty of all his subjects, it would be far from correct to say that the power of the monarchy is negligible in the present constitution of England. "In the impartial exercise the prerogatives, as also in his position as permanent head of the executive, in whom the various threads of the administration are centred, and as the representative of the national power and dignity, independent of and above the changes and intrigues of party government, the true significance and importance of the sovereign as a constitutional monarch are to be found."[5] In a recent address to the American Bar Association, Lord Birkenhead observed: "the prestige of the monarchy and its influence in the prudent and conscientious hands of King George have rather waxed than waned. No great decision of State is taken without close discussion with the sovereign." Every project of legislation, every matter of general policy has to be submitted to the king before it is announced to the public. In regard to foreign politics royal influence is not only

4. Bagehot's Eng. Cons., p. 75.
5. Hal., Vol. VII, p. 8.

very considerable but oftentimes highly beneficial. The saying of Thiers that in England "the king reigns but does not govern" is thus at best but a half truth. In fact as Sir William Anson observes, "the influence of the crown is something not easy to define either in theory or in practice."[6] Within the last decade monarchies and empires have tumbled down[7] and disappeared all over the world in rapid succession but the British throne stands to-day more firm than ever. Parliaments and cabinets come and go but the king abides amid all changes of policy as an embodiment of the principles and traditions of the nation.

Title to the Crown.—It is difficult to say whether under common law title to the crown is elective or hereditary, for throughout English history both principles have operated and determined succession to the throne. During Saxon times at any rate kingship was not hereditary but elective.[9] The Saxon king was a representative chief. The king was elected by the *Witan* but the election was confined to members of the royal family. The first four Norman kings were also elected by the *Commune concilium* which corresponded to the Witan. With the development of feudal ideas, the king came to be regarded as the Universal Landowner which he was not, in Saxon times; this territorial, apart from personal aspect of kingship gave birth to the hereditary right to the crown which became descendible according to the feudal land law, *i.e.*, the crown became descendible as an estate in fee simple. The principle of

6. Anson, Vol. II, p. 6.

7. *E.g.*, Russia, Austria, Germany, Turkey, Bavaria, Saxony, Saxe-coburg, Poland, Hungary, Greece and even China.

9. See Anson, Vol. II, Pt. I, p. 6 *et seq.*

election was however not abandoned. When Parliament replaced the Witan and the *Commune Concilium*, Henry IV had the crown entailed on him and the heirs of his body by a statute. From this time a conflict appears to have grown up between two views of kingship, one based on Parliamentary choice and the other on right by inheritance and often the claim based on hereditary right was further fortified by an Act of Parliament. In the 17th century the claim by hereditary right gained its maximum strength under the theory of divine right of kings but that theory was finally exploded in the closing years of the reign of James II. Since the reign of Stephen, the right of Parliament to regulate the succession has been manifested on at least six occasions,[10] *viz.*, on the deposition of Edward II (1327) and Richard II (1399) and on the accession of Henry VII (1485), James I (1603) and William III (1694) and finally by the Act of Settlement. The Act of Settlement of 1700 has not only settled the line of succession to the English throne but has laid down conditions under which the king is allowed to retain it. By this Act the crown was settled on the heirs of the body of Princess Sophia, a daughter of Elizabeth who was sister of Charles I and daughter of James I, who had married Augustus of Hanover.[11] The Act has further laid down conditions that the king is not to profess the Papish religion or marry a Papist but to belong to the Church of England and to take the coronation oath according to the provisions of 1 Will. and Mary, c. 6, and make a declaration as prescribed by the Bill of Rights, now regulated by the Accession Declaration Act of 1910.

10. Kelke, p. 18.
11. See Chart.

"The Coronation Oath indicates the contractual character of English sovereignty, a character which was common as well to the official chief of Saxon times as to the territorial lord of feudalism."[12]

Old English conception of Royalty.[12A]—The principal traits in the old English conception of Royalty were: (1) Tribunal war-chief, supreme in war time but in times of peace controlled by the tribal council in which he was but *primus inter pares*, (2) Universal Land-owner, and feudal lord introduced by the Feudal system, (3) Representative of Caesar or part inheritor of the Roman Empire, (4) the most sacred Anointed one or possessing a *quasi*-spiritual character still preserved in the coronation service, and (5) the embodiment of perfection and other qualities attributed to kingship by legal theory.

In the Saxon period, the king was a representative chief elected by the Witan. In the Norman period and after the Conquest the position of the king was greatly altered partly as effect of the Conquest and partly owing to the introduction of feudal ideas. In regard to his relation to the subject it created a personal tie based on allegiance on one side and protection on the other and thus gave to the relation a contractual character. In regard to the right to the throne it weakened the elective basis by assimilating the descent of the crown to the feudal descent of land.

Descent of the Crown.—The crown now descends, subject to the statutory limitations of the Act of Settlement of 1700, according to the feudal rules of hereditary descent; *i.e.*, lineally to the issue of the reigning

12. Anson, Vol. II, pp. 237-238.
12A. See Kelke, pp. 16-17.

sovereign, males being preferred to females, and subject to the right of primogeniture amongst both males and females of equal degree, whilst children would represent their deceased ancestors *per stirpes in infinitum*. Upon failure of lineal descendants crown would pass to the nearest collateral descendant from the blood royal.[13]

Title of the King.—In the last Imperial Conference of 1926, it was decided that the title of the king should be slightly changed and should run as follows : "George V by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the seas, King, Defender of the Faith, Emperor of India."[13A]

The Royal Family.—There is no royal caste, *i.e.*, the reigning sovereign alone or the King or Queen Regnant possesses the royal prerogatives, the other members though enjoying certain privileges are none the less subjects of the sovereign owing him allegiance and may be guilty of treason. The Queen Consort is protected by the law of treason. Of the children of a reigning sovereign, the eldest son and daughter and the eldest son's wife only have any special privilege. The eldest son becomes Duke of Cornwall by birth and is created Prince of Wales by Letters Patent. It is treason to compass his death or to violate the chastity of his wife or of the eldest daughter unmarried of the king. On the death of the King Regnant, the Queen Consort becomes the Queen Dowager but she ceases to be protected by the Statute of Treasons because any attempt upon her life or chastity would no longer endanger the succession. The husband of the Queen Regnant is at common law like an ordinary subject and may be guilty of treason.

13. Hal., Vol. VI, pp. 320-322.

13A. It has been given effect to by an Act of Parliament,

There are four instances of Queens Regnant having married and the position of the Prince consort has varied according to statutory privileges.[14] The right of custody of the minor grandchildren belongs to the king and by the Royal Marriage Act of 1772 no descendant of George II, except the issue of Princesses married into foreign families, can make a valid marriage unless the King or Queen Regnant has given consent under the Great Seal. Formerly it was high treason to contract such marriage without approval of the sovereign. At the age of twenty-five one may marry without royal sanction only after giving 12 months' notice to the Privy Council if during that time the two Houses of Parliament have not expressed their disapproval.

14. See Ch. and Asq., p. 92.

CHAPTER XI.

THE ROYAL PREROGATIVE.

Definition and nature of Royal prerogative.—It is defined as "that pre-eminence which the sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England."[1] The powers exercised by the Crown are either conferred by Statute or exist in virtue of custom or Common law. The term prerogative applies only to the latter, *i.e.*, to the non-parliamentary powers and privileges of the sovereign. It is created by common law for the benefit of the subjects but its limits and extent are somewhat vague at common law and that is how and why English monarchs in former times used to commit illegalities in the name of so-called prerogative. In the *case of Proclamations* [2] (8 Jac. I, 1610) the judges, Coke and others when called before the Privy Council declared that "the king hath no prerogative except which the law of the land allows him and he cannot change any common law, statute law or customs by proclamation." Thus the king can claim no prerogative which is not allowed by common law or which is contrary to Magna Carta or any other Statute or to the liberties of the subject.[3] The prerogative of the crown,

1. Hal., Vol. VI, p. 371.
2. 2 St. Tr. 723; see *ante*, Ch. III.
3. Hal., Vol. VI, p. 372.

being created for the *benefit* of the people, cannot be exercised to their prejudice.[4] The courts have therefore jurisdiction to enquire into the existence or extent of any alleged prerogative. The Bill of Rights and the Act of Settlement have brought the prerogative within legal bounds which the king cannot transgress.[5] How the prerogative is now actually exercised in practice and with what results we will see later on.

What it includes.—(1) The existing arbitrary powers of the Crown, *i.e.*, the powers which can be legitimately exercised by the executive without the authority of an Act of Parliament. Prof. Dicey defines it as " the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the crown."[6] It is the residue because much of it has been curtailed, limited or restrained by statutes; it is the remnant of those powers which the king at one time possessed as the tribal chieftain and now as the supreme executive officer in the State; (2) those special privileges enjoyed by the sovereign in relation to rights of property and person as feudal lord such as rights of escheat, treasure trove, custody over infants, idiots and so on ; and (3) those attributes of special pre-eminence and dignity with which kingship has been clothed by legal theory such as the attributes of absolute perfection (king can do no wrong), of perpetuity (king never dies) and so on. Of these the *first* constitutes the bulk of the existing prerogatives and forms the most important branch known as the political prerogatives of the crown.

4. Broom's Legal Maxims, p. 40.
5. Anson, Vol. II, p. 35.
6. Dicey, p. 420; see *Atto Gen.* v. *De Keyser's Royal Hotel*, (1920) A.C. 508 (526) where the definition given by Prof. Dicey is accepted by the House of Lords.

Sources of prerogative.[7]—All prerogatives may therefore, be traced to one or another of the *three sources, viz.*, (1) the executive powers which the king at one time possessed in all the departments of government as *tribal chieftain;* (2) the privileges enjoyed by the king as *feudal lord* and ultimate landowner; and (3) the attributes with which, from motives of convenience, kingship was invested by legal fiction and which have hardened into legal rules and made the king an *embodiment of legal* maxims.

Classification of prerogatives.—The prerogatives may be classified in various ways. They may be classified according to their sources as (1) Powers and authorities intrusted to the sovereign by common law as the supreme executive officer in the State (trial chieftain), (2) Privileges enjoyed under common law in relation to rights of property for revenues and royal dignity (feudal lord), and (3) Special attributes of kingship due to its pre-eminence and dignity (legal theory). Practically the same classification is given by Blackstone, *e.g.*, (1) those regarding the royal authority, (2) those regarding the royal revenue (minora regalia), and (3) those regarding the royal character. Another simpler though not quite accurate or logical mode of classification suggested is, into (1) Personal, (2) Political, and (3) Revenue prerogatives, political prerogatives being subdivided again into foreign and domestic, and the domestic prerogatives being further subdivided according as they affect different departments of administration.[8] What are called personal prerogatives here, are really those attributes with which kingship is invested by legal theory and from which follow certain legal privileges and immunities in proceedings by or against the crown.

7. See Anson, Vol. II, pp. 3-5.
8. See Ch. and Asq., p. 97.

Examples of arbitrary exercise of prerogative in former times.[8A]—The most glaring examples were: (1) Attempts to legislate independently of Parliament by Royal Proclamation. The ancient mode of legislation by Ordinance was revived in legislation by Proclamation. In spite of the adverse decision of Coke J. and others in the *case of Proclamations*,[9] proclamations continued to be issued and infringements thereof punished by the Star Chamber. Now, king can alone legislate by Orders in Council and probably also by Proclamations only (*a*) in conquered and ceded colonies to which representative government has not been granted,[10] and (*b*) under statutory authority as under the Trading with the Enemy Act of the Emergency Powers Act (1920, 10 and 11 Geo. V, c. 55). The statutory authority however must be strictly construed. Thus sec. 43 of the Customs Consolidation Act of 1876 authorises the prohibition by Proclamation or Order in Council of the 'importation of arms, ammunition, gunpowder, or any other goods.' During the war of 1914 there was a proclamation prohibiting the importation of pyrogallic acid used in photography and in *Attorney-Gen.* v. *Brown*,[11] Crown claimed forfeiture of the casks of acid imported by the defendant. It was held that the Crown had no power to make the proclamation and that it was invalid and illegal. The words 'any other goods' must be taken *ejusdem generis*. (2) Attempts to nullify the effects of statutory enactments in individual cases by the exercise of the prerogative of

8A See *ante*, Ch. III, "Obstacles to Parliamentary Sovereignty in former times."

9. (1610) 2 St Tr. 723; see Thomas's L. C., 5th Edn., p. 8.

10. See Hal., Vol. VI, 423.

11. (1920) 1 KB 773; (1921) 3 KB. 29. In this connection see also the observation of Lord Shaw in *Rex* v. *Halliday*, (1917) A.C. 260 (House of Lords).

dispensation. In such attempts the crown was often supported by a subservient judiciary as is illustrated in the cases of *Thomas* v. *Sorrel* [12] and *Godden* v. *Hales.*[13] (3) General *suspension* of existing statutes as in the famous Declaration of Indulgence by James II in 1687 which led to the *Seven Bishops' case.*[14] By exercising the so-called prerogatives of dispensation and suspension the king really wanted to place himself above law. The power of suspension was directly, and of dispensation indirectly but virtually, abolished by the Bill of Rights which enacted " that the pretended power of *suspending* of laws, or the execution of laws, by regal authority without consent of Parliament is illegal " and " the pretended power of *dispensing* with laws or the execution of laws by regal authority *as it hath been assumed and* exercised of late is illegal " (4) *Arbitrary taxation* by proclamation, letters patent or writs, either indirectly by raising duty on commodities as in *Bate's case* [15] or directly by issue of a writ under the great seal addressed to the sheriff of each county as in *Hampden's case* [16] known as the *case of Shipmoney.* The Bill of Rights declared levying of money for the use of the crown without grant of Parliament as illegal. (5) *Grants of monopolies and trading licenses.* Under common law such grants by Crown are bad except for new inventions and so in the case of *Darcey* v. *Allien* [17] (Case of *Monopolies*) grant of a patent for the exclusive making and importing of playing cards was held to be a monopoly and therefore void as contrary to common law and public policy, Queen Elizabeth having

12. (1674) Vang. 330; see *ante*, Ch. III, p. 67.
13. (1686) 11 St. Tr. 1166; see *ante*, Ch. III, p. 68.
14. (1688) 12 St. Tr. 183; see *ante*, Ch. III, p. 68.
15. (1606) 2 St. Tr. 371; see *ante*, Ch. III, p. 67.
16. (1637) 3 St. Tr. 826; see *ante*, Ch. III, p. 67.
17. **(1602, 44 Eliz) 11 Co. Rep. 84. See Tho., L.C. (5th Edn.), p. 1.**

been deceived in making the grant. This case led to the passing of the Statute of Monopolies (1624, 21 Jac. I. c. 3) confining grants of patents only to new inventions which are now regulated by the Patents and Designs Act of 1907 (7 Edw. VII. c. 29). Again under common law all British subjects have equal right of trading in His Majesty's dominions but in the case of *East India Co. v. Sandys* [18] (The Great Case of Monopolies) the grant of sole trading to the company was held to be good. The reasons given by Lord Chief Justice Jefferies in an elaborate judgment, are : (*i*) That by the laws of nations, the regulation and restraint of trade and commerce is reckoned *inter Juris Regalia, i.e.*, the prerogative of the Supreme Magistrate. (*ii*) That although monopolies are prohibited by the laws of England and other countries, there are exceptions such as, when conducing to public benefit, or granted to a public society, etc. ; and (*iii*) that as British subjects had no freedom and liberty to trade in the *Indies*, it would be no monopoly to grant the charter. (6) *Arbitrary imprisonment and the issue of commissions of martial law.* Safeguard against the former and in fact the greatest safeguard for the liberty of the subject at the present day is secured by the Habeas Corpus Acts; and the latter, *viz.*, declaration of martial law in times of peace was prohibited by the Bill of Rights. In *Darnel's case*[19] which marks the beginning of the final struggle against imprisonment by arbitrary order of the king, Darnel and four other knights were arrested and imprisoned on the Fleet by special command of the King Charles I, for having resisted forced loans. On the issue of the writ of *Habeas Corpus* on the Warden of the Fleet, return was submitted that the prisoners were in custody

18. (1684) 10 St. Tr. 371.
19. Also known as Five Knights' case, 3 St. Tr. 1.

under a warrant of the Privy Council by special command of His Majesty. It was argued on behalf of the prisoners that as *no cause* of imprisonment was assigned, the prisoners were entitled to be released. The court rejected the argument and refused bail on the ground that Royal command *per se* imported some lawful ground, even though not disclosed, and that it would have been otherwise if an *insufficient* cause had been shown in which case the court would have directed release. The decision caused great dissatisfaction and resolutions were passed in the House of Commons and conference of the two Houses was held which ultimately led to the celebrated Petition of Right.

Statutory limitations of the prerogative.—The extent of the prerogative being necessarily somewhat vague at common law it has been found necessary to define its limits more precisely by Statutes and this has been done from time to time and specially by the four great Charters,[20] *viz.*, the Magna Carta (15th June, 1215, King John), the Petition of Right (1628, Charles I), the Bill of Rights (1688, William III and Mary), and the Act of Settlement (1700, William III). In fact the struggle between the Crown and the Parliament to fix the limits of royal prerogative went on from the time of the Magna Carta to the Act of Settlement. By the principal provisions of the four great Charters the rights and liberties of the subject are protected against illegal invasion by the Crown or its ministers.[21] But inspite of these Charters, owing to the indifference of the mass of the people, existence of rotten boroughs, Parliamentary corruption, defects in the system of Parliamentary representation and other causes, the King could

20. See Hal., Vol. VI, pp. 377-381.
21. For the provisions, see *ante*, Book I, Ch. II.

control the House of Commons and have his way with a subservient Parliament. This state of things continued more or less down to the reigns of George III and George IV. It was not till the House of Commons came to be really a representative assembly of the nation voicing its will that there could be a real check to the arbitrary exercise of prerogative and now as we have seen, it is the cabinet which in the name of the sovereign exercises these prerogatives. As pointed out by Anson definition or limitation of prerogative began really with the existence of Parliament representing the community in its entirety and possessing the power, through the power of the purse, of restraining the royal will.

Effects of legislation on prerogative.—Parliamentary statutes have in some cases directly and expressly abolished a prerogative as in the case of the prerogative of suspension and in others, indirectly but virtually abolished, as in regard to the prerogative of dispensation, by the Bill of Rights. In many instances however legislation has made definite changes in the prerogative but beyond those changes, the prerogative is left untouched. Thus the prerogative of the sovereign as *parens patræ* except so far as affected by the Custody of Infants Acts of 1873 and 1891 can still be exercised and is exercised by Lord Chancellor; so again the prerogative of the crown as the head of the army is exercised in various directions through the War Secretary save and except so far as affected by the Annual Army Act and other Statutes; and so, in fact in regard to every branch of the prerogative. In *Attorney General* v. *De Keyser's Royal Hotel*[22] Lord Dunedin observes: "In as much as the crown is a party to every Act of Parliament it is logical

22. (1920) A.C. 508 at p. 526.

enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the crown assents to that, and by that Act, to the prerogative being curtailed." Swinfen Eady M. R. declared that where a matter within the prerogative is provided for by the Statute, the prerogative is merged in the Statute. On appeal to the House of Lords Lord Parmoor in his judgment declared the constitutional principle to be that "when the power of the Executive to interfere with the property or liberty of the subject had been placed under Parliamentary control and directly regulated by Statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown, but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject." [23]

How the prerogative is now actually exercised and the results thereof.—Here is another example of the divergence between theory and practice in the English constitution. The prerogative of the sovereign is, no longer, except in the case of the purely personal ones, exercised by the sovereign personally but by the Ministers or the cabinet in the name of the Crown. In 1830 George IV taking compassion on an Irishman convicted of arson and sentenced to death desired to exercise the prerogative of mercy and wrote privately to the Lord Lieutenant to that effect. Sir Robert Peel, the then Home Secretary, thereupon addressed a strong remonstrance to the king for having exercised the prerogative of mercy unknown to his Ministers, and the Prime Minister,

23. See Thomas's L.C. (5th Edn.), pp. 64-66.

Duke of Wellington, interviewed the king who ultimately had to give way and the man was hanged.[24] Thus it is the leading party in the House of Commons or rather the cabinet which really wields the prerogative; *party government* is nothing but the wielding of the prerogative by the leading party. The important results that follow from this practice are : (*a*) To limit the sovereign's choice of Ministers. As Ministers are responsible to Parliament for the exercise of prerogative, it becomes incumbent on the sovereign to select Ministers who enjoy the confidence of the House of Commons. (*b*) To increase enormously the power of the cabinet. It is said "the commons (rather the cabinet) have drawn into their own control all the existing powers of the sovereign." (*c*) Were it not that the prerogative powers of the sovereign as the supreme executive authority are exercised in his name by Ministers responsible to Parliament and were it not that there exist other constitutional checks, England instead of being the land of liberty and freedom as it is, would have groaned under the worst form of despotic rule. Walter Bagehot, writing of Queen Victoria says, "she could disband the army, she could dismiss all the officers, from the general commanding-in-chief downwards; she could dismiss all the sailors too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a peer; she could make every parish in the kingdom a 'University;' she could dismiss most of the civil servants, and she could pardon all offenders. In a word the Queen could by Prerogative upset all the action of civil government within the

24. See Anson, Vol. II, p. 44.

government; could disgrace the nation by a bad war or peace, and could by disbanding our forces, whether land or sea, leave us defenceless against foreign nations."[25] But all this is prevented by the prerogative being exercised by the cabinet and the cabinet being the mouthpiece of the nation.

Constitutional checks upon improper exercise of prerogative by the Ministers and the executive.[26]—By reason of the absence of any remedy for wrongful acts, against the sovereign in person or against his ministers and public servants in their *official* capacity, resulting from the maxim 'the king can do no wrong,' it is essential that there should be some checks on the arbitrary and improper exercise of prerogative. Such checks are afforded by (1) Courts; for in case of any illegal order or demand, the servants of the crown in order to enforce obedience must have recourse to courts which will then determine if such order falls legitimately within royal prerogative allowed by common law. (2) The doctrine of ministerial responsibility which makes the ministers responsible to Parliament for their *policy*, *i.e.*, for every advice they give to the crown, and therefore liable to censure or impeachment for any bad advice. (3) Personal liability of the ministers, servants and public officers generally in their individual capacity for every tortious or criminal act. This follows so far as the Ministers are concerned, from the formality which requires every order of the Crown whether it be Order in Council or order under Sign Manual or under the Great Seal to be countersigned by a Minister or Ministers who become responsible for it, and so far as other public servants are concerned, from the rule or

25. Bagehot's English Constitution.
26. See Hal., Vol. VI, pp 382-383

supremacy of law and from the absence of *droit administratif* in the constitution of England. Every person however high his position, is responsible for his acts and " the warrant of no man not even of the king himself can excuse the doing of an illegal act." If any person whether an officer of state or a subordinate, has to justify an act alleged to be unlawful by reference to an Act of Parliament, or State authority, the legal justification can be enquired into by court."[26A] The plea of State necessity [27] or orders of the crown [28] or of a superior officer [29] is not permissible in justification of an illegal act. Thus " every public act even of the crown itself is indirectly brought under the supremacy of the law of the land." (4) The right of petitioning the Crown for redress of grievances where no action would lie, a right questioned before,[30] but finally recognised by the Bill of Rights. (5) The obligation to summon Parliament annually and observe the conventional laws and customs of the constitution, from the necessity of obtaining supplies and passing the annual Acts.

Existing Prerogatives.—Existing prerogatives are too numerous to be mentioned here.[31] Control of the Army and Navy, general defence of the realm, government of Colonies to which responsible legislature has not been granted, conferring of titles and honours, making of war, peace and treaties, appointment of ambassadors, grant of charters and franchises, grant of pardon, dissolution, etc., of Parliament, appointment of public officers

26A. *Per* C. C. Ghosh, J., in *Kumar Shankar* v. *H. E. A. Cotton*, 40 Cal. L. J. 515 (521), quoting the observations of Bailhache, J., in *China Mutual Steam Navigation Co., Ld.* v. *Maclay*, (1918) 1 K. B. 33 (41).

27. *Entick* v. *Carrington*, (1765) 19 St. Tr. 1029 (1067).

28. *Danby's (Earl) case*, (1679) 11 St. Tr. 599.

29. *Keighly* v. *Bell*, (1866) 4 F. and F. 763 (790).

30. See *Seven Bishops' case*, (1688) 12 St. Tr. 183.

31. See Hal., Vols. VI and VII.

are only some of the examples. The most important of the prerogative under each class are only briefly noticed here.

Class (A) **Political prerogatives:**—(1) **Executive.** —As part of the prerogative, the supreme executive authority is vested in the crown. All executive acts are acts of the Crown and done in the name of the king. Of these, some are done under statutory powers and some under prerogative or common law powers. The king's pleasure for administration purposes is expressed in one of three ways: (*a*) By Order in Council; (*b*) By order, commission or warrant under Sign Manual; and (*c*) By proclamations, writs, letters patent or other documents under the Great Seal.[32] The Great Seal has to be affixed to all documents dealing with important matters of State. A small number of the Privy Council including some Ministers are summoned to advise and assist the king in issuing orders and proclamations. When the wishes of the king in council are expressed in the form of a resolution and communicated to those concerned it is called an *Order in Council*. Orders in Council are mostly those made in pursuance of express statutory powers. There are numerous statutes which authorize the crown in council to make rules and regulations—an example of delegated legislation. Thus during the late war the king was vested with large powers to make such regulations under the Defence of the Realm Act or the Emergency Powers Act. Regulations for the Army and Navy, legislation for Crown Colonies and protectorates, application of the provisions of the Extradition Act to particular States and so on are all made by Orders in Council. When it is desired to make the matter known generally

32. See Anson, Vol. II, p. 50.

to the subjects it is done by *proclamation*, *e.g.*, in declaration of peace or war, to summon, prorogue or dissolve Parliament, etc. A *writ* is a mandate addressed to an individual to do or forbear from doing some act and a *letters patent* is an open document to which the Great Seal is affixed and used for various purposes.[33] There are numerous executive acts to which the king himself is a party. It is said that Queen Victoria had to sign more than 50,000 documents every year.

(2) **Judicial.**—(*a*) The king is "the fountain of justice." This means the king is the distributor, the reservoir, and not the author or originator of justice,[34] the original power of judicature being vested in society at large. Hence it follows that the crown cannot interfere with existing jurisdictions or create courts with new jurisdiction. In the *Bishop of Natal's case* [35] it is laid down; "it is a settled constitutional principle or rule of law, that although crown by its prerogative may establish courts to proceed according to common law, yet that it cannot create any new court to administer any other law; and it is laid down by Lord Coke in the 4th institute that the erection of a new court with a new jurisdiction cannot be without an Act of Parliament." In conquered and ceded colonies before representative legislatures have been granted the Crown may under prerogative establish courts to administer law other than common law [36] but not in settled colonies where the settlers take with them the common law of their own country.[37] The crown cannot establish a court of equity it. being the exclusive jurisdiction of the Court of Chancery

33. Anson, Vol. II, p. 50 *et seq.*
34. See Ch. and Asq., p. 102.
35. (1864) 3 Moo. N. S. 115 (152).
36. See Hal., Vol. VI, pp. 404 and 426.
37. Anson, Vol. II, p. 296.

from time immemorial to decide all matters of equity; cannot issue commissions to try civilians by martial law in time of peace;[38] cannot interfere in the administration of justice nor alter the laws of the land. (*b*) All writs and processes run in the king's name and are executed by his officers. (*c*) The King enjoys the prerogative of *pardon* and reprieves exercised through the Home Secretary and in Colonies, delegated to the governor. In **India,** powers of suspension, remission and commutation of sentences are exercised under statutory provisions, by the Governor-General in Council or by the Local Government under sections 401 and 402 of the Criminal P. Code. Governor-General may also exercise the Crown's prerogative of mercy if only such power is delegated to him. Pardon cannot be pleaded by way of defence to an impeachment by the House of Commons.[39] The right of pardon is confined to offences of a public nature. The king cannot pardon a public nuisance whilst it continues, nor can pardon a libel or a slander or where the penalty of *priaemunire* has been incurred for sending a man in custody out of the kingdom contrary to the Habeas Corpus Act, or remit a recognisance to keep the peace. Pardon may, in general, be granted either before or after conviction. Effect of pardon under the Great Seal or Royal Sign Manual is to clear the person from all infamy, and from all consequences of the offence and from all statutory or other disqualifications following upon conviction, in short, to make him as it were, a new man.[40] In *Hay* v. *The Tower Division Justices*,[41] it was held that the disqualification imposed by Sec. 14 of 33 and 34 Vic. c. 29 on a person convicted of felony, from selling or

38. See *ante*, Petition of Right.
39. See *ante*, Act of Settlement; see also Danby's case.
40. See Hal., Vol. VI, p. 406.
41. (1890) 24 Q. B. D. 561.

obtaining licence to sell spirits by retail, was removed by pardon. He can even maintain an action against any person afterwards defaming him in respect of the offence for which he was convicted, for, as held in *Cuddington* v. *Wilkins* [42] the felony is, by pardon, extinct. Again by the Civil Rights of Convicts Act of 1828 (9 Geo IV, c, 32) (Sec. 3) the effect of serving out the sentence after conviction of a felony not punishable with death is the same as grant of pardon under the Great Seal and so when the editor of a newspaper brought an action for libel for calling him a felon editor, the court held in *Leyman* v. *Latimer* [43] that as the plaintiff had served out his sentence he was constructively pardoned and so the action would lie and he was entitled to damages. (*d*) All final appeals, where allowed, lay originally to the King, afterwards to the King in Council and since 1833 to the Judicial Committee of the Privy Council. (*e*) Immunity of the crown and the departments of Government as agents of the Crown, from the jurisdiction of the courts, except where Government officials or departments have been invested either by statute or by crown with the attributes of a corporation.[44] Thus the war office may sue and be sued in the person of the Secretary of State for war and the Secretary of State for India in Council may sue and be sued for the government of India.

(3) **Legislative.**—(*a*) The Crown is a necessary party to every legislation, all laws being " enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in Parliament assembled and by the authority of the same." (*b*). To summon, prorogue and dissolve Parliament. A new Parliament cannot assemble without

42. (1615) 1 Hal. 67.
43. (1876) 3 Ex. D. 15.
44. See Hal., Vol. VI, p. 414 and Anson, Vol. II, p. 298.

the royal writ. (*c*) The Crown possesses the right of veto, though the right has never been exercised since 1707. (*d*) The Crown may legislate for Crown colonies until representative institutions have been granted, either through a Governor or by Order in Council.

(4) **Ecclesiastical prerogative.**[45]—(*a*) The king is the only supreme head on earth under God, of the church of England, and, as the head, elects or nominates for election archbishops and bishops and certain other dignitaries of the church; convenes, prorogues and controls the two ecclesiastical Houses of Convocation of Canterbury and York each having an upper and a lower chamber. Licence and assent are necessary before the canons can be enacted so as to bind the clergy; to bind the laity they further require the authority of an Act of Parliament. (*b*) The king as head of the church is the ultimate court of appeal in ecclesiastical suits, and since 1833, the appellate jurisdiction is exercised by the Judicial Committee of the Privy Council.

(5) **Army and Navy.**—The king's prerogative to keep a standing army has been taken away by the Bill of Rights; its existence now depends on the Annual Army Act. The prerogative to maintain the Navy, however, has not been interfered with by Parliament. Apart from the statutory provisions, large prerogative powers are left in the Crown exercised through the First Lord of the Admiralty or the Secretary of State for War, *e.g.*, selection and appointment of commanding officers and generally all matters relating to the organisation, disposition, *personnel*, armament, and maintenance of the military and naval forces.[46]

45. Hal., Vol. VI, p. 391 *et seq.*; see *post*, Ch. XIII, under 'Powers of the sovereign as supreme head of the church.'

46. Hal., Vol. VI.

(6) **War prerogatives.**—For the commonwealth a man shall suffer damage; " by common law everyone may come upon another's land for the defence of the realm." The king as *supreme potestas* is endowed with the right and duty of protecting the realm [47] and thus necessarily *enjoys* somewhat larger prerogatives in time of war than in time of peace—can issue martial law proclamation for trial of civilians, ordinary courts ceasing to have any jurisdiction over the action of the military authorities,[48] can restrain subjects and aliens from entering or leaving the realm; may recall subjects from abroad; lay embargoes upon shipping; promulgate blockade of enemy ports and coasts; can enter on the land of a subject to erect fortifications (*Magdalen College case*) [49] or to dig for saltpetre, as saltpetre is necessary for the defence of the whole realm (*case of Saltpetre*);[50] can take possession and occupy without compensation any lands or premises for the purposes of defence (*Petition of Right case*),[51] but not for mere administrative purposes (*Att. Gen.* v. *De Keyser's Royal Hotel*);[52] can seize the goods of a subject for general good; " *salus populi maxima lex*, *i.e.*, the safety of the people is the supreme law, is a good maxim and the enforcement of that essential law gives no right of action to whomsoever may be injured by it."[53] In the *Petition of Right case* [53A] the military authorities took possession of certain lands and buildings of the suppliants for an aerodrome which it was found

47. *Saltpetre case* (1606) 12 Co. Rep. 12; Thomas's L. C., 5th Edn., p. 62.

48. *Ex parte Marais.*

49. (1615) 1 Roll. Rep. 151.

50. (1606) 12 Co. Rep. 12; Thomas's L. C. (5th Edn.), p. 62.

51. (1915) 3 K. B. 649.

52. (1920) A.C. 508.

53. *Per* Darling, J., in *Shipton, Anderson and Co.* v. *Harrison*, (1915) 3 K. B. 676 (684).

53A. See Thomas's L. C. (5th Edn.), pp. 63-64.

was necessary for safety and defence of the realm. The petitioners claimed proper compensation under the Defence Act 1842 and other Acts. The crown denied liability to pay compensation; the High Court held that ' His Majesty, by virtue of his war prerogative, through his representatives was, under the existing circumstances, entitled to take possession without compensation.' The judgment was affirmed by the Court of Appeal but on appeal to the House of Lords the case was compromised, the Attorney General admitting that the petitioners had some ground for supposing that the crown had proceeded under the Defence Act of 1842 which provided for compensation.

(7) **Foreign.**—The Crown is the delegate of the nation for the conduct of foreign affairs and as such, possesses the prerogative right to appoint ambassadors, consuls, etc.; to grant passports; to make treaties and declarations of war or peace. The effects of declaration of war are—(*a*) to prohibit all commerce and intercourse between subjects resident in British territory and enemy-aliens, (*b*) to make all contracts during war void, and (*c*) to abrogate all pre-war contracts (*Ertel Bieber and Co.* v. *Rio Tinto Co.*).[54]

(8) **Colonial.**—(*a*) In Crown Colonies, *i.e.*, those to which representative legislature has not been granted, the Crown enjoys the right of legislation and the control of administration; the common law rule restraining the creation of Courts of Equity or Ecclesiastical Courts or Courts to administer any other than the common law, does not it seems, apply,[55] except in Settled Colonies.[56] But the Crown is not entitled to erect Courts

54. (1918) A. C. 260.
55. Hal. Vol. VI, p. 296.
56. See *ante*; Anson, Vol. II, p. 296.

or make rules contrary to the fundamental laws of the constitution or contrary to the general laws of trade and the liberties of the subject.[57] The right of legislation ceases if the power is once delegated to a local authority. Accordingly in *Campbell* v. *Hall* [58] which was an action against the collector of customs in the island of Greneda to recover money paid as duty upon exports, it was held that the duty was illegally imposed, the Crown having already delegated the power of legislation to a local assembly by its declaration of 1763. (*b*) In Colonies with full representative Government, no right of legislation exists except the right of veto which is now seldom exercised; the Crown retains however prerogative claims with regard to rights of property. (*c*) Final appeal from all Colonies where permitted lies to the King in Council, now to the Privy Council, and the Crown may also under prerogative grant *special* leave.

(9) **Titles of honour and dignities.**—The Crown is the Fountain of Honour, *i.e.*, the sovereign enjoys the sole right of conferring all titles of honour, dignities and precedence. Titles of honour are conferred either by express grant in the form of letters patent, or by writ of summons in the case of peerages, or by direct corporeal investiture, as in the case of knights.[59] The Crown however cannot limit the descent of a peerage in a manner unknown to common law and it was accordingly held in the *Wiltes case* [60] that the grant of a peerage to a man and his heirs male was bad; and in the *Buckhurst case* [61] Lord Cairns laid down that a peerage partaking of the qualities of real estate, must be made descendible in a

57. Hal., Vol. VI, p. 426, note.
58. (1774) 20 St. Tr. 239-354.
59. Hal., Vol. VI, p. 455.
60. (1862) L.R. 4 House of Lords 126.
61. (1876) L. R. 2 A.C. (House of Lords) 1.

course known to the law. A title cannot be extinguished except by the extinction of inheritable blood by death or attainder, nor can it be surrendered or aliened.[62] In Republican States titles of honour and nobility are neither conferred nor recognised.

(10) **Crown as Parens Patriae.**—The Crown enjoys the prerogative right of control of the person and estates of infants, idiots and lunatics and of charities. The jurisdiction in these matters is now assigned to the Chancery Division of the High Court.

(11) **Grants of Franchises, corporations, etc.**—Franchises are royal privileges in the hands of the subject when granted, *e.g.*, markets, fairs, fisheries, etc., and may be claimed by express grant or prescription which presupposes previous grant. Grants of *monopolies* by the Crown are bad at common law [63] except in the case of patents for new inventions which are now regulated by the Patents and Designs Act of 1907 (7 Edw. VII, c. 29). The Crown enjoys the exclusive right of creating *corporations by Charter*.[64] The King cannot make grants in derogation of the common or statute law, nor except in the case of certain franchises, make any grant of a royal prerogative or anything which is prejudicial to the administration of justice.[65] The common law rules relating to Crown grants have been largely superseded by statutes. Grants of public money out of the consolidated Fund are now made on the authority of an Act of Parliament or resolution of the House of Commons.[66]

62. Hal., Vol. VI, p. 457.
63. *Case of Monopolies* (1602) 11 Co. Rep. 846.
64. See Hal., Vol. VI, 491.
65. See *Ibid*, p. 485 *et seq.*
66. See *Ibid*, p. 478.

Class B. **Personal prerogatives.**—These are mostly attributes with which the Crown has been invested by legal theory, making the King *an embodiment of legal maxims.* In consequence of these prerogative maxims, the Crown enjoys many privileges and immunities in legal proceedings. The most important examples are :—

(1) **The King can do no wrong** [67] (*Rex non potest peccare.*)—This follows from the attribute of perfection. The maxim means two things : (1) That the King is not personally liable for any act done by him, the King in his personal capacity not being answerable to any earthly tribunal.

(2) No one can plead the orders of the Crown in defence of any wrongful *or illegal act.*[68] "For, as the King can do no wrong it follows he cannot authorise wrong ; for to authorise a wrong to be done is to do a wrong, the wrongful act being in the eye of law, the act of him who directed or authorised it to be done. As the sovereign cannot authorise a wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown."[69] Under the conventional rule of the constitution no administrative act can be done by the King unless countersigned by some responsible Minister or Ministers and it is not the King who is responsible for the Act, but his instruments or the Ministers.[70] And hence follows the doctrine of ministerial responsibility and restriction of the freedom of action of the sovereign.

67. See Broom's Legal Maxims, p. 38 *et seq.* See also Anson, Vol. I, Ch. I, p. 45.

68. See Dicey, p. 24.

69. See *Feather* v. *The Queen* 6 B. and S. 258 (297).

70. See Dicey, p. 25; see also Anson, Vol. II, Pt. I, pp. 5 and 45. See *post*, Ch. XIV, "Ministerial Responsibility."

The Maxim '*King can do no wrong*' does not mean that the King is above law; by the Coronation Oath the King is bound to obey law. "The King is under the law," says Bracton, "for the law makes the King."[70A] The maxim is based upon the theory that Royal prerogative being for the *benefit* of the people, the King cannot sanction any act forbidden by law.[71] "The King," says Blackstone, "is not only incapable of *doing* wrong but even of *thinking* wrong." "The law presumes the King will do no wrong, neither indeed can do any wrong."[72] Hence in case of Royal grants which turn out to be void, the presumption of law is that the King has been *deceived* in the grant.

One important result of the maxim is that no proceeding, civil or criminal, is maintainable against the sovereign in person; there being no right, the law supplies no remedy. Further, as the master is liable for the wrongful acts of his servants on the principle that their wrong doing is his wrong doing, no action for tort lies against Government Departments or against officers and servants of the Crown in their *official capacity*. What are the remedies of the subject in such cases we will see elsewhere.[73] It may be noticed here that the maxim "*King can do no wrong*" found no place in **Hindu jurisprudence.** Although the King was held in the highest reverence and was supposed to be incarnation of the eight guardian deities of the world,[74] yet it was ordained that "where another man would be fined one Kârshâpaṇa, the King shall be fined one thousand; that is the settled

70A. *Cf.* Vedic texts "Law is the King of Kings, etc.;" see Sarvadhikari's Hindu Law of Inheritance (T.L.L., 1880), 2nd Edn., p. 106.

71. Broom on Legal Maxims, p. 40.

72. Quoted from Hale in *Tobin* v. *The Queen* 16 C. B. NS. 310.

73. See *post*, Proceedings against the Crown and its servants.

74. Manu, Ch. V, 96.

rule.''[75] So again in the Sukraniti : '' If the King is an enemy of virtue, morality and power and is unrighteous in conduct, the people should expel him as a destroyer of the State.''[76]

(2) **Nullum Tempus Occurrit Regi.**—No time runs against the King. This also follows from the legal attribute of perfection and the result is *laches* or lapse of time does not, in general, bar Sovereign's right of action. There are however, now, many exceptions to this rule by reason of statutory enactments, *e.g.*, in suits relating to land, Crown's right is barred by sixty years (Nullum Tempus Act, 1769); in informations for usurping corporate offices or franchises, by the lapse of six years; indictment for treason and misprision of treason in England and Wales, except where there is an attempt to assassinate the King, must be brought within three years and so on. Prescription and Limitation Acts do not bind the Crown except where expressly named.[77] In *Rustomjee* v. *The Queen*[78] Cockburn, C.J., observes : '' The Crown cannot be bound by Acts of Parliament which have relation only to the course of procedure between subject and subject.''

(3) **The King never dies.**[79]—This follows from the attribute of *perpetuity* or immortality of kingship. Blackstone says, '' Henry, Edward and George may die but the King survives.'' What it means is that '' the sovereign always exists, the person only is changed ''; in other words, there is no interregnum or interval, kingship vesting at once on the heir. But as succession to

75 *Ibid*, Ch. VIII, 338.

76. See Pramathanath Banerjea's Public Administration in Ancient India, Ch. VII.

77. *Wheaton* v. *Maple* (1893) 3 Ch. 48 C. A

78. (1876) 2 Q.B.D. 69.

79. Broom's Legal Maxims, p. 35.

the English throne is regulated both by statute and descent, heir means successor to the Throne. Thus by a grant to the King and his heirs, where a new dynasty comes in, the first King of the new dynasty would be the heir; where the King dies without issue male, his eldest daughter would take under the grant. Again, the sovereign being a Corporation sole, grants by him binds his successors and grants to the sovereign pass a fee simple estate.[80]

The attribute of perpetuity of Kingship is however not of universal application. Thus, the maxim '*actio personalis moritur cum persona,*' *i.e.*, a personal right of action dies with the person, has been held to apply to the King as well. In *Canterbury* v. *Att. Gen.*,[81] which was a petition of right by the Speaker of the House of Commons for compensation from the Crown (Queen Victoria) for damage caused by fire due to the negligence of the servants of the Crown during the reign of her predecessor William IV, it was laid down that even if William IV, had been liable which, of course, he was not, such liability would cease with his death. Again in *Att. Gen.* v. *Kohler* [82] it was held that a sovereign could not be held responsible to refund money paid to the Treasury by mistake in the reign of his predecessor.

In spite of the legal theory of perpetuity it became necessary when James II fled, to declare that the Throne was vacant.[83]

(4) **The King is never an infant.**—This also follows from the attribute of perfection, the law holding the King always capable of transacting business. In

80. Hal., Vol. VI.
81. (1842) 1 Phillips 301.
82. 8 H. L. 634.
83. See Anson, 6. 4.

practice however, statutes called Regency Acts are passed to enable the Regent to do the work of the King during his minority.

(5) **The King is not bound by statutes.**—As statutes are made for the subject and not for the King, the general rule is the Crown is not bound by statute or bye-laws under statute unless expressly named or bound by necessary implication.[84] "For it is inferred *prima facie* that the law made by the Crown, with the assent of the Lords and Commons, is made for subjects and not for the Crown."[85] In *Wheaton* v. *Maple and Co.*[86] Lindley L.J. also observes that "the general rule is that the Crown is never bound by a statutory enactment unless the intention of the legislature to bind the Crown is clear and unmistakable." The above rule however, applies only where the property or peculiar privileges or prerogatives of the Crown are affected.[87] Statutes for public good, for the preservation of public rights, suppression of public wrong, relief and maintenance of the poor, advancement of learning, religion and justice, prevention of fraud, etc., by implication bind the Crown though not expressly named therein.[88] On the other hand, the Crown may take advantage of statutes though not named, unless expressly or impliedly prohibited from doing so.[89]

(6) **Freedom from arrest.**—Not only the King's person cannot be arrested but no arrest can be made in King's presence or within the verge of the Royal Palace, nor any person attached to Royal household can be

84. See Hal., Vol. VI, p. 409; *Magdalen College case* and the cases cited in Ch. and Asq., p. 101.

85. *Per* Alderson B in *Att. Gen.* v. *Donaldson* 10 M and W 124; see also *Rustomjee* v. *The Queen* (1876) 1 Q. B. D. 487.

86. (1893) 3 Ch. 64.

87. See Broom's Legal Maxims, p. 57.

88. *Ibid.*

89. Hal., Vol. VI, 405.

arrested in any Civil proceeding except on leave of the Lord Chamberlain.[90]

(7) **Freedom from taxes, rates, tolls, etc.**—This follows from the Crown not being bound by any statute.

(8) **Freedom from corruption of blood.**—The King's blood cannot be corrupted. Thus, if before accession he were guilty of treason, be would be purged of all guilt as soon as he ascends the Throne.

(9) **Priority of Crown rights.**—Where the rights of the King and the subject conflict, the right of the King is to prevail. The Crown cannot be a joint tenant with a subject but would take the whole; but may be a tenant in common.[91]

(10) **The King is God's Minister on Earth.**—The King is under nobody but God. The King's realm is an Empire and no Emperor, greater than the King. The King is under God and the law (*Sub Deo et lege*) for the law makes the King.[92]

Class C. **Revenue prerogatives and prerogative rights relating to property.**—These have their origin in the King being at one time the feudal Lord and Universal Landowner. The sources of revenue are (A) *ordinary* or *hereditary* and (B) *extraordinary* or depending on taxes, annual or permanent, imposed by Parliament and forming by far the largest proportion of the National income. The ordinary or hereditary revenues have all now been surrendered to the nation and go to the Consolidated Fund. The *hereditary* revenues are derived mainly from :

(1) Crown lands or lands and interests in lands as are or may become vested in the sovereign in his body

90. See Hal., Vol. VI, 408 and 409.

91. See Hal., Vol. VI, p. 493; Broom's Legal Maxims, p. 54 *et seq.* (7th Edn.).

92. See Broom's Legal Maxims (7th Edn.), p. 33.

politic in right of the Crown.[93] They comprise the original demesne lands, lands which come by escheat, forfeiture or other means, foreshore, and lands acquired by alluvium and diluvium. *Escheat* was formerly of two kinds, *per defectum sanguinis, i.e.*, when a man dies without heirs and *per delictum tenentis* (forfeiture) which occurred when a person was convicted of treason or felony, now abolished by the Forfeiture Act of 1870.

(2) Revenues derived from various prerogative rights relating to property enjoyed by the Crown; *e.g.*, right to *bona vacantia* (including waifs, wrecks, estrays and treasure trove); the prerogative rights relating to Royal mines (gold and silver) and the right to dig for saltpetre, fisheries, royal fish (Whale and Sturgeon) and Swans; revenues derived from the *droits* of the Admiralty and from the Courts of Justice, and from fines, recognisances, legal fees and forfeitures and from prerogatives connected with the Church such as the temporalities of Bishoprics during vacancy, etc.[95] *Bona Vacantia* is applied to chattels and goods in which no one can claim a property and includes the personal estate of persons dying intestate without next of kin, besides waifs, wrecks, etc., but not goods lost or designedly abandoned, the property in which is vested in the first finder whose title is good against the whole world except the true owner in the case of goods lost.[96] *Waifs* are things stolen and thrown away by a thief in his flight (the owner not having pursued the thief and retaken the goods). *Wrecks* (including *flotsam* or things found floating near shore; *jetsam* or things thrown overboard to save ship and *ligam* or things tied to a buoy or like object for preservation) are deserted ships, but no

93. Hal , Vol. VII, p. 108.
94. *Ibid*, p. 111 *et seq.*
95. See Hal., Vol. VII, p. 108 and Ridges, p. 112.
96. *Armory* v. *Delamirie* (1721) 1 Sm L. C 356 Hal., Vol. VII, p. 209.

ship is a wreck if there be a human being or any living creature on board; now regulated by the Merchant Shipping Act of 1894. The finder is to deliver them to the district receiver of wrecks and if unclaimed for a year and a day, they become Crown's property and go into the Consolidated Fund.

Estrays are valuable animals (not wild animals or such animals as cats and dogs) found wandering, of which the owner is not known. After a year and a day they belong to the Crown.[97]

Treasure trove is gold or silver either in coin, plate or bullion found long after it was hidden in the earth or other secret place and when the person who hid it is not known or discovered. Where it is scattered, lost or abandoned it does not become treasure trove to constitute which, it must be hidden with *animus revocande.*[98] The finder must inform the Coroner of the district, concealment being punishable with fine and imprisonment.

(3) Certain revenues derived from taxation which were settled upon the Crown by statute, some of which have now been surrendered to the nation along with other hereditary revenues and paid into the Consolidated Fund such as, revenues from the post office; and others, repealed and have ceased to be chargeable such as hereditary excise on beer, ale and cider.[99]

Civil list.—It has become customary since the accession of George III, 1760, to surrender all the *hereditary* or *ordinary* revenues to the nation in return for a fixed annual sum known as the *Civil List.* The hereditary revenues of the King therefore now go to the National Exchequer and form part of the Consolidated

97. See Hal., Vol. VII, p. 214.
98. See *Ibid*, pp. 212-213.
99. See Ridges, p. 112.

Fund or National income. Theoretically they are liable to resumption by the succeeding sovereign but practically such a step would never be thought of. By the present Civil List Act the King, in consideration of the surrender, receives £470,000 per annum.

CHAPTER XII.

PROCEEDINGS AGAINST THE CROWN AND ITS SERVANTS.

Proceedings against sovereign.—As the King can do no wrong,[1] no proceeding civil or criminal is, at common law, maintainable against the sovereign in person, for as in the eye of law no such wrong can be done, so, in law, no right to redress can arise.[2] In Civil cases not arising out of tort, a remedy against the Crown is however, allowed as a *matter of grace* by *petition of right*. But the remedy is not available in regard to cases of wrong or tort alleged to be done by the King or his servants acting on his behalf. In *Tobin* v. *The Queen* [3] where the petitioner alleged that the captain of the Queen's ship employed in the suppression of the slave trade had under a mistaken impression taken and burnt a schooner belonging to him the court dismissed the petitioner on the ground, amongst others, that "as the King can do no wrong, he is not liable to be sued civilly or criminally for a supposed wrong." In *Feather* v. *The Queen* [4] which was a petition of right for infringement of a patent right by officers of the Crown it was laid down "the maxim King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the sovereign. For from the maxim that the King

1. See *ante* under "King can do no wrong:' Ch. XI.
2. See *Feather* v. *The Queen* 6 B. and S. 293 (297).
3. (1864) 16 C. B. (N.S.) 310; 33 L. J. (C.P.) 199 (206).
4. (1865) 6 *Best and Smith* 257.

can do no wrong it follows as a necessary consequence, that the King cannot authorise wrong. For to authorise a wrong to be done is to do a wrong; in as much as the wrongful act, when done, becomes, in law, the act of him who directed or authorised it to be done. It follows that a petition of right which complains of a tortious act done by the Crown, or by a public servant by the authority of the Crown discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of law no such wrong can be done, so in law no right to redress can arise.''[5] Accordingly it was held that as infringement of a patent right constituted a tort or wrong in the proper sense of the term, and as no wrongful act could be alleged against the Crown, a petition of right to the Crown would not be open to the aggrieved party as a means of redress. If in the above case the action had been brought personally against the public officer doing the wrongful act, instead of against the Queen or the Crown, the suit would have been maintainable and the plaintiff entitled to redress as held in *Madrazo* v. *Willes*,[6] *Walker* v. *Baird*[7] and other cases. This is the rule in the United Kingdom. In many of the Colonies, this prerogative of the Crown is waived and under special Colonial statutes and ordinances, suits for tort may be brought against the Crown in the name of the Attorney General.[8]

Identification of the State with the King and its effects.—The above privileges and exemptions in legal proceedings against the Government and Government

5. *Ibid* at p. 296.
6. 1820, 3 B and A 353; 24 R. R. 422.
7. 1892, A. C. 491.
8. *Att. Gen. of Straits Settlement* v. *Wemyer* 13 App. Cas. 192. As regards suits against Government of India see *post*.

servants in their *official* capacity arise in England by reason of the King being identified with the State or the Government. The maxim King can do no wrong is extended to all executive acts. According to English common law the King can sue in its own Courts but cannot be sued either in its own Courts or in the Courts of any other sovereign State unless the King has either expressly or impliedly consented to be sued. In France or other continental countries the State is regarded as a juristic entity capable, like corporations, of suing and being sued. The principle of state responsibility in France "is the result," says Garner, "in part, of the growth of the democratic conception that the State is a moral person possessing duties as well as rights and in part, of the enormous expansion of the activities of the State by which it came to be the largest employer of labour." In France the State is liable to the individual not only in contract but also in tort where the tortious act of the agent is not a purely personal act. In Germany and other continental countries state liability is even more largely recognised. In America, although the form of government is republican, the principle of English common law is followed and no suit for tort can be brought against the Federal Government or the Government of the States except where allowed by statutory enactments.[9] In **India**, the Government has been made a juristic person by statute at least for purposes of suing and of being sued, section 65 of the Government of India Act of 1858[10] enacting (1) The Secretary of State in Council may sue and be sued in the name of the Secretary of State in Council, as a body corporate and (2) every

9. See Com. Adm. Law by N. Ghosh (Tagore Law, 1918), Ch. XII.
10. Now replaced by Sec, 32 of the Government of India Act of 1919.

person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858 and this Act (1919) had not been passed. Thus the Government of India can be sued not only on contracts, no petition of right being necessary, but also for torts in regard to all matters for which the East India Company, a private Corporation could have been sued. In many of the Colonies also we have seen suits for torts may be brought against the Crown in the name of the Attorney General.

Legal irresponsibility of the supreme executive.—In monarchical countries the King is necessarily absolutely irresponsible, being responsible to no one but to God. A King cannot be a King if he is made responsible. As observed in *Tobin* v. *Queen* "the notion of making the sovereign responsible for a supposed wrong tends to consequences which are clearly inconsistent with the duties of the sovereign." But even in non-monarchical countries such as France or America where the office of the supreme executive is not hereditary but elective, the supreme executive enjoys while in office, a large amount of limited legal irresponsibility, *i.e.*, immunity from the jurisdiction of the Courts for illegal acts, else, the work of administration cannot go on. In France the President is liable to impeachment only for treason and in America for treason, bribery and other high crimes and to removal on conviction. But in regard to other illegal acts or acts beyond their powers under the constitution, they can be brought to account only on the expiry of their term of office. In order to harmonize the immunity and irresponsibility of the supreme executive or the sovereign with the rule of law and security of the rights and liberties of the subject, English constitution evolved the doctrine of

ministerial responsibility which requires that every order of the sovereign is to be countersigned by a Minister who will be held personally responsible. The doctrine has been adopted in most countries except in the United States where however by reason of the rule of personal liability which is followed equally in England and America public officers carrying out illegal orders of the President will be held personally responsible.[11] The mischief however is practically minimised by the duties and functions of the *President* being minutely defined by the constitution and by the fact of his being made responsible *for such acts* after the expiry of his term of office.

Proceedings in regard to Acts of State.—No action would lie in regard to what are called Acts of State; Municipal Courts have no jurisdiction to enquire into their propriety or their validity.[12] " Even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy." [13] Municipal Courts however, have jurisdiction to decide if the act is really an Act of State.[14]

What are Acts of State.—The expression is used in different senses.[15] Further, it is difficult to give one definition which will cover all examples. It is usually defined to denote an act done in the exercise of sovereign power by an independent State or potentate, or by its duly authorised agents or officers.[16] If done by an agent in excess of his authority but subsequently ratified by its

11. See *post*, p. 250.

12. *Secy. of State* v. *Kamachee* 7 M. I. A. 476 (540); *Salaman* v. *Secy. of State* (1906) I. K. B. 613, C.A.

13. *Secy. of State* v. *Kamachee* 7 M. I. A. 476 (540).

14. *Musgrave* v. *Pulido* (1879) 5 App. Cas. 102; see also 7 M. I. A. 476 (531) and 1 K. B. 613 (639) C.A. (1906).

15. See Ch. and Asq., p. 27; Hal., Vol. 23, p. 304.

16. Hal., Vol. 23, p. 304; see also *Salaman* v. *Secy. of State* (1906) 1 KB. 613 at p. 639.

Government it would become an Act of State.[17] Acts of State, explains Lord Kingsdown, are acts not done under colour of legal title, affecting to justify themselves on grounds of Municipal law,[18] but acts done in the exercise of supreme power on grounds of State policy without the intention to give thereby any legal right, contractual or otherwise. In *Salaman* v. *Secretary of State*, Fletcher Moulton L. J. observes: "The true view of an Act of State appears to me to be that it is a catastrophic change, constituting a new departure. Municipal Law has nothing to do with the acts of change by which this new departure is effected. Its duty is simply to accept the new departure."[19]

Different meanings of different kinds of Acts of State.—(1) *As against aliens*, Acts of State mean those executive or administrative acts of the Crown or its agents which, if done by private persons, would be tortious or criminal; or, to put it in the words of Fitz James Stephen, "acts injurious to the person or property of some one, who is not *at the time of that act* a subject of Her Majesty.' Such acts may be illegal and arbitrary but being done in the exercise of supreme or sovereign power as matters of State policy are beyond the jurisdiction of Civil Courts. The test is, as pointed out by Lord Kingsdown, whether the act was done in the exercise of the arbitrary power as sovereign, or under colour of legal title or with the intention of giving legal rights. In *Secretary of State of India* v. *Kamachee Boye Saheba*,[20] where the widow of the late Raja of Tanjore

17. *Buron* v. *Denman* 2 Exch. 167; *Secy. of State* v. *Kamachee* 7 M. I. A. 476 (539).

18. *Secy. of State* v. *Kamachee* 7 M. I. A. 476 (531).

19. 1 K. B. 613 at p. 640 (1906).

20. (1859) 7 M. I. A. 476; 13 Moore P. C. c. 22. Also known as the case of the Raja of Tanjore.

claimed certain properties of her husband, it was held that as the British Government acting as a sovereign power, through its delegate, the E. I. Co., seized, from motives of state, the Raj and all the properties of the Raja of Tanjore, a native independent sovereign, the seizure was an act of State, to enquire into the propriety of which Municipal Courts had no jurisdiction. "Transactions of independent States between each other, are governed by other laws than those which Municipal Courts administer. Such Courts have neither the means of decreeing, nor the power of enforcing any decision which they make."[21] In *Ex-Raja of Coorg* v. *The East India Co.*[22] where the East India Company having made war against the Raja who was an independent sovereign and made him prisoner, annexed his territory and seized his property part of which consisted of Notes of the E. I. Co., a bill was brought by the ex-Raja to recover the Notes as his private property, it was held by Sir John Romilly, Master of the Rolls, following the decision of Lord Kingsdown in the case of the Raja of Tanjore, that as they were not his private property but belonged to him in his character of Raja and when the property of a captive prince is taken by a hostile sovereign power in war, no Court of Justice has jurisdiction over such a transaction. The Master of the Rolls observes: "If this case can be fairly represented to be an instance of a foreign power taking prisoner a *private* individual who is an enemy, and while so holding him, obtaining possession of documents which established his right to recover a debt due to him in his private capacity, then I am clear the Plaintiff is entitled to relief, and that the circum-

21. *Ibid* at p. 75.
22. 29 Bev. 300 (1860).

stance that the Defendants constitute both the conquering power and the debtor does not in any respect vary the question. But if the Notes were the property of the Plaintiff in his character of Raja of Coorg, and if they were taken possession of by the Defendants in the exercise of their sovereign and political power, then I am equally clear that this Court cannot interfere."[22A] In *Salaman* v. *Secy. of State in Council*[23] the facts are as follows: The East India Co. as representing the Crown, annexed the territory of an independent sovereign and confiscated the State property, granting to the ruler Daleep Sing, then an infant, a pension for life, assumed the custody of his person during his minority and took possession of his private property. After his death an action was brought by the trustee in bankruptcy of his residuary legatee against the Secretary of State in India, as the successor of the E. I. Co., for arrears of the pension, and for an account of the private property, alleging that the Co. had undertaken the legal obligations of guardians of and trustees for the Maharaja. It was held that under the circumstances, the acts done by the Company as aforesaid were so clearly done by them as Acts of State, in respect of which no action was maintainable, that the action should be summarily dismissed as frivolous and vexatious. In *Buron* v. *Denman*,[24] the Captain of a British Man-of-War, unauthorised by the British Government concluded a treaty with the native King on the West Coast of Africa for the abolition of slave trade in his country and thereafter fired the premises and carried away and released the slaves of the plaintiff who was an

22A. *Ibid* at p. 309.
23. (1906) 1 K. B. 613, C. A.
24. 2 Exch. 167 (1848).

alien, being a Spanish subject. The defendant's proceedings were ratified by Government. In an action for damages, it was held that the ratification of the defendant's act by his Government made it an Act of State for which no action could be maintained. As pointed out in *Feather* v. *The Queen*[25] by adoption by the Government "the private right of action becomes merged in the international question which arises between our own Government and that of the foreigner." In *Johnstone* v. *Pedlar*[25A] the House of Lords held that a friendly resident alien was in the same position as an ordinary subject, and that therefore, there could not be, as to him, an Act of State.

(2) *As against British subjects.*—No illegal act can be pleaded as an Act of State as against *a British subject*. If a British subject suffers damage from any wrongful act, unauthorised by Parliament or outside the constitutional limits of the Royal prerogative, he has a right of action against the officer by whom the act was done, even if it was expressly authorised by the Crown or the Government.[26] In *Sprigg* v. *Sigcau*, after the annexation of Pondoland to Cape Colony, the respondent, a former independent native chief, was arrested under a proclamation issued by the Governor; in *Walker* v. *Baird* a lobster factory belonging to British subjects in Newfoundland was seized by Government servants; in *Johnstone* v. *Pedlar* the moneys found with the respondent who was arrested in Ireland for illegal drilling during the war, were taken possession of by the Police;

25. (1865) 6 B. and S. 258 (296).

25A. 2 App. Cas 262 (1921).

26. See Hal., Vol. XXIII, p. 309 and *Money* v. *Leach*, *Entick* v. *Carrington*, *Raleigh* v. *Goschen* (1898) 1 Ch. 73, *Sprigg* v. *Sigcau* (1897) A. C. 238; *Walker* v. *Baird* (1892) A. C. 491; *Johnstone* v. *Pedlar* (1921) 2 A. C.

in all, the defence that the acts were acts of state and therefore not subject to the jurisdiction of municipal courts was rejected as wholly untenable. In such an action by a British subject the plea that it was done under State policy as an act of State would not be permissible. In *Entick* v. *Carrington* [27] where Carrington with three other persons acting under a warrant from a Secretary of State forcibly entered the plaintiff's house as the author of a seditious libel, and carried away his books and papers and the plaintiff brought an action of trespass, it was held that Secretary of State had no authority to issue such warrant which was therefore void and illegal. In this case it was pointed out that the English common law did not recognise state necessity or any distinction between State offences and other offences.[28] In the case of *John Wilkes*,[28A] Lord Mansfield observes : "The Constitution does not allow reasons of State to influence our judgments : God forbid it should ! We must not regard political consequences, how formidable soever they might be : if rebellion were the certain consequence, we are bound to say *Fiat justitia, ruat cœlum* " (Let justice be done though the heavens should fall). Therefore as against a British subject there may be an Act of State only when done in the exercise of the existing residuum of the prerogative.[29] As between sovereign and subject Acts of State must therefore be such acts as the sovereign can lawfully do,[30] for, "the warrant of no man not even of the King himself can excuse the doing of an illegal act."

27. (1765) 19 St. Tr. 1030; 2 Wils 275.
28. See Anson, Vol. II, Pt. II, p. 300.
28A. (1765) 19 St. Tr. (Howell's) 1075 (1112).
29. See Hal., Vol. XXIII, p. 305.
30. See Anson, Vol. II, Pt. II, p. 82 *foot note.*

(3) *Acts of Colonial Governors.*—Public acts of Colonial Governors if done as acts of State policy and *within* the scope of their delegated authority would be Acts of State; but if outside the scope of their authority they cannot be regarded as done on behalf of the Crown and if wrongful, the Governors would be liable for them in Courts of Justice. In *Musgrave* v. *Pullido*[31] the respondent brought an action for damages for trespass against the appellant who was Governor of the island of Jamaica for unlawful detention of his ship and cargo. The defences were (1) that the defendant being Governor-in-Chief of Jamaica no suit could lie in any Court of the island and (2) that the act being done in the exercise of his discretion as Governor was an Act of State in regard to which no action was maintainable. Both the defences were negatived by the Privy Council: the first defence was negatived on the authority of *Hill* v. *Bigge*[32] which differed from the *dictum* of Lord Mansfield in *Fabrigas* v. *Mostyn*[33] that the Governor of a Colony is in the nature of a Viceroy and therefore during the term of his office no civil or criminal action would lie against him locally, in regard to acts done in his official capacity. In regard to the second defence it was held that the authority of a Governor of a Colony was derived from his commission and was limited to the powers thereby expressly or impliedly entrusted to him and any public act done beyond such authority could not be considered as done on behalf of the Crown and therefore the privilege of an act of State policy could not be claimed.[34]

31. (1879) 5 App. Cas. 102.
32. 3 Moo. P. C. C. 465 (1841).
33. 1 Cowp. p. 161 (1773); 1 Sm. L. C. 658.
34. See Anson, Vol. II, Pt. II, pp. 81-82. See *post*, Ch. XXIII.

(4) *Acts by the Government of India, in the exercise of its sovereign powers.*—How far **Government of India** as successor of the E. I. Co., can be sued for torts of its servants committed in the discharge of their official duties is a vexed question. In England we have seen the Crown is not liable nor its servants in the *official* capacity, but Government servants are personally liable, the plea that the wrongful act was done as an Act of State not being permissible. The East India Co., to which certain sovereign functions were delegated was still in the fullest sense a corporate body and as such could not claim the prerogative of the Crown, *viz.*, immunity from liability for torts of its servants in the discharge of their official duties when they affected British subjects. After the assumption of the sovereignty by the Crown of England, Parliament declared by Sec. 65 of the Act of 1858 corresponding to Sec. 32 of the present Government of India Act of 1919 that every person shall have the same remedies against the Secretary of State in Council (representing the Government of India) as he might have had against the East India Co. Therefore it would appear that suits for acts of torts committed by Government officials in the discharge of official duties, and affecting British subjects would still lie against the Government of India. There are cases [35] however, where it has been held that Sec. 65 or 32 of the Government of India Acts does not contemplate cases where the wrongful act is committed by Government servants in the exercise of sovereign powers but that the section is "limited to

35. *Nobin* v. *Secy. of State* 1 Cal. 11; *Secy. of State* v. *Cockraft* 39 Mad. 351; *McIrerny* v. *Secy. of State* 38 Cal. 797; see also discussion in Ghose's Com. Adm. Law, p. 318 *et seq.*; see also *Secy. of State* v. *Hari Bhonji* 5 Mad. 273, where Turner C. J. dissented from the view taken in 1 Cal. 11; Ghosh, p. 325. See also Laws of India, Part 3, by Arthur Eggar, p. 58 *et seq.*

suits for acts done in the conduct of undertakings which might be carried on by private individuals without sovereign powers." In *Nobin* v. *Secy. of State for India in Council*[36] the facts were as follows: The plaintiff, a licensed *ganja* shop holder offered the highest bid for the sale of licenses which was accepted and the necessary deposit made. Subsequently the excise authorities refused license to the plaintiff and failed to return the deposit. The plaintiff brought the suit against the Secy. of State for damages for breach of contract which he alleged was completed on acceptance of his bid. The High Court dismissed the suit holding there was no contract and even if there was a contract, the suit was not maintainable being in respect of acts done by the Government in the exercise of its sovereign powers. Their Lordships distinguished the case of *P. and O. Company* v. *Secretary of State*[37] where suit for damages against Government for injury done to one of the plaintiff company's horses through the negligence of some men employed at the Government dockyards was decreed, on the ground that there the negligence was an act done by Government servants in carrying on the ordinary business of shipbuilders, unconnected altogether with the exercise of sovereign powers, and which any individual could have carried on for the same purpose; for such an act the E. I. Co. would have been liable and therefore under Sec. 65 of the Act of 1858 or Sec. 32 of the present Government of India Act, the Secy. of State would also be liable. Thus their Lordships drew a distinction between acts done by the E. I. Co. in their private capacity and acts in the exercise of sovereign powers and

36. I. L. R. 1 Cal. 11.
37. Bourke's Rep., Pt. VII, 167; 5 Bom. H. C. R. (Appendix) (1861)

interpreted Sec. 65 as being limited to suits of the former kind. In *Secy. of State* v. *Cockraft*[38] the plaintiff's suit for damages for injuries sustained in a carriage accident due to negligence in maintaining properly a military road in charge of the P. W. D. of Government was also dismissed by the Madras High Court for the same reasons.

Thus we see Acts of State may be of various kinds. In *Salaman* v. *Secy. of State*, Fletcher Moulton L. J. observes :[39] "Acts of State are not all of one kind ; their nature and consequences may differ in an infinite variety of ways and these differences may profoundly affect the position of Municipal Courts with regard to them."

Examples of Acts of State.—Declaration of war, making of treaties, acquisition of territories in any manner whatsoever, whether by occupation, conquest or cession,[39A] bonafide acts of the military and executive authorities during martial law, acts of Colonial Governors within the scope of their delegated authority, wrongful acts affecting aliens done in the exercise of sovereign authority, acts of the Lord Lieutenant of Ireland done in his politic capacity,[40] acts of the Crown in a newly acquired territory, dealings of the Government of India with independent Native States in the exercise of its sovereign power, official acts of every independent State, acts of the Government of India even if wrongful and affecting British subjects, done in the discharge of its sovereign powers, may be cited as examples of different kinds of acts of state for which no action would lie in

38. 39 Mad. 351.
39. 1 K. B. 613 at p. 639 (1906).
39A. See *Nayak Vajesingji* v. *Secy. of State for India* (1924) P. C.
40 *Sullivan* v. *Spencer* 6 Irish Rep. C.L. 176.

Municipal Courts. They include also what are more accurately called *Facts of State.*[41]

Liabilities of, and proceedings against public servants.—Apart from the immunities and privileges enjoyed by officials discussed elsewhere, the liabilities of servants of the crown may be looked at from two points of view, *viz.*, (A) in their *official* capacity and (B) in their *personal* capacity.

(A) In their *official* capacity the question of liability may arise under several heads: (1) In regard to *torts* committed in the discharge of official duties. We have seen no action can be brought against government servants or government departments as an official body as agents or as representing the crown,[42] for the simple reason that their wrongful acts are the wrongful acts of their master, the King, who can do no wrong and therefore no remedy is available.[43] (2) In regard to *contracts* entered into on behalf of the crown, remedy is by *petition of right* to the crown and not by a regular suit.[44] The reason is as the crown cannot be sued directly, the property of the crown or the public revenues cannot be reached by a *suit* against a public officer in his official capacity.[45] (3) Where there is express *statutory liability* or where government officials or departments of state have been invested with the attributes of a corporation action would lie in the ordinary way; *e.g.*, the war office in the person of the Secretary of State for war, the Government of India in the person of the Secretary of

41. See Hal., Vol. XXIII, pp. 304 and 305.

42. See *ante*, under "King can do no wrong" and see *Raleigh* v. *Goschen* (1898) 1 Ch. 73.

43. See *ante*, Ch. XII, "Proceedings against sovereign."

44. See *Feather* v. *The Queen* 6 B. and S. 293 cited with approval in *Windsor and Annapolis Ry. Co.* v. *The Queen* 11 App. Cas. 615.

45. See *Palmer* v. *Hutchinson* (1881) 6 App. Cas. 619 (623).

State for India in Council may be sued and so on.[46] (4) Where *statutory duty towards the public* apart from duty to the crown is laid upon certain departments and not left to their discretion, *mandamus* will lie to compel performance in case of neglect or refusal.[47] Courts will not enforce mere duty to the crown and unless there is also a duty towards the subject or the public, no suit will be maintainable.[48] In *Kinlock* v. *Secretary of State for India* [49] where the Queen by Royal warrant "granted" booty of war to the Secretary of State for India in Council in " trust " for the officers and men of certain forces, to be distributed by the Secretary of State or by any other person he might appoint, and the appellant brought an action on behalf of himself and all other persons entitled under the royal grant to share in the booty claiming an account and distribution of the residue, the suit was dismissed on the grounds, firstly that it was not maintainable against the Secretary of State for India in Council as a Corporation and secondly, it was not a trust which could be enforced by the Equity Court *as the duty was to the Crown alone*, the Secretary of State being only an agent of the Crown for the purpose of the distribution and could not be treated as a trustee in the proper sense of the term. So also in *Gidley* v. *Lord Palmerston*,[50] it was held that the suit which was brought against the defendant as Secretary of War by the executor of a war office clerk for arrears of retired allowance due to the testator, it was held that the action was not

46. See Hal., Vol. VI, p. 414. See *ante*, p. 235.

47. See Hal., Vol. X, pp. 77-104 and see Ghosh's Com. Adm. Law, p. 408 *et seq*. and pp. 609-610.

48. See Anson, Vol. II, Pt. II, pp. 302-302; see *The Queen* v. *Lord Commissioners of the Treasury* (1872) L.R. 7 Q.B. 387.

49. 7 App. Cas. 619 (1882).

50. 3 Brod and Bing 284 (1822).

maintainable, on the ground, firstly, that Lord Palmerston was only the agent or officer of the crown, responsible to the crown for the due discharge of his duty and there was no duty to the subject, and secondly, on the ground that a servant of the crown contracting on the part of the Government was not personally liable. (5) As regards *criminal* liability, officials are triable like ordinary citizens. In the case of Governors, statute 11 and 12 Will. III, C. 12 enacts that all crimes committed by Governors of plantations. . . in the plantations shall be tried in the Court of Queen's Bench, or by special commission.[51] There is a similar provision in Sec. 127 of the **Government of India** Act of 1819 that all persons holding office under Crown are liable to be tried in England for any offence in India against any person under his authority.

(B) Liability of public officers in their *personal* capacity—(1) In regard to *torts* committed in the discharge of their official duties : Although no action lies either against the Crown or against the public servant in his official capacity on the principle that the king can do no wrong, it does not follow, as pointed out in *Feather* v. *The Queen*[52] "that a subject sustaining a legal wrong at the hands of a minister (or any public officer, for the matter of that) of the crown is without a remedy." The officer committing the wrongful act is personally liable without showing malice or want of probable cause and it would be no defence to say that it was done by order of the sovereign or of any minister or any other superior officer or of an executive department,

51. See Thomas's L.C. (5th Edn.), p. 92.
52. 6 B. and S. 258 at p. 296 (1865).

or as an Act of State.[53] In *Rogers* v. *Rajendra*[54] Dr. Lushington observes : "If the act which he did was in itself wrongful, as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorised, or whether it were done by the order of the superior power. The civil irresponsibility of the Supreme power to tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is *morally* bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration."[54A] If however, the injury ensues from the proper performance of duties imposed upon a public servant by statute or is caused by something which the Government servant was *justified* in doing in the discharge of his duty, no personal liability would arise as was held in *Rogers* v. *Rajendra*.[55] In that case the plaintiffs were the owners of a steam tug and the defendant was a Government servant, Superintendent of Marine under E. I. Co. On the refusal of the plaintiffs to take the appellant's steamer on tow on the terms offered, he issued a notice to all pilots under Government forbidding them to use plaintiff's tug. The plaintiff brought a suit for damages against the defendant which was decreed by the Supreme

53. There are certain exceptions, *e.g.*, in the case of Judicial, Military and Naval Officers, etc.

54. 8 M. I. A. 103 (131).

54A. As a matter of fact Government almost invariably indemnifies the public officer made to pay damages and is thus indirectly made liable for the tort of its servants.

55. *Ibid.*

56. 8 M. I. A. 103.

Court at Calcutta, but on appeal was dismissed by the Privy Council on the ground stated above. The head of a Government department, however, is not personally liable for the wrongful acts of its official subordinates unless special mandate or adoption of the act by the head is proved,[57] for the simple reason that the subordinates as well as the head are in the service of the crown. In *Raleigh* v. *Goschen* which was a case of trespass on land by officials of the Admiralty, the Court exonerated Mr. Goschen, the First Lord of the Admiralty on the ground that there was no evidence that he actually committed the trespass or authorised it and held that as mere head of a Government department he could not be liable for wrongful acts of subordinates in the department who could have been sued *individually* for trespasses committed or threatened by them, but not as an official body. To the same effect was also the decision in *Bainbridge* v. *Postmaster General*,[58] *Lane* v. *Cotton*,[59] *Jones* v. *Mossell*[60] and other cases.

(2) In regard to *contracts* entered into on behalf of the Crown we have seen the remedy in such cases is by *petition of right* to the Crown and the Government official cannot be made personally liable for the breach of contract for the simple reason that no one would accept any office of trust under Government under such conditions.[61] In *Macbeath* v. *Haldimand*[62] the defendant as Governor of Quebec had entered into certain

57. *Raleigh* v. *Goschen* (1898) 1 Ch. 73; *Jones* v. *Monsell* (1872) 2 Cowp., p. 754; *Bainbridge and another* v. *Post Master General* (1906) 1 K.B. 178.

58. (1906) 1 K. B. 178.

59. (1699) 1 Ld. Raymond 646.

60. (1872) 2 Cowp., p. 754.

61. *Cf.* Similar provisions in Sec. 32, cl. 4 of the Government of India Act of 1919.

62. (1786) 1 Term Rep. 172.

contracts on behalf of the crown with the plaintiff but the Treasury paid only part of the claim rejecting the remainder on the ground that the terms of the contract were unreasonable. Thereupon the plaintiff sued the defendant personally and it was held the suit was not maintainable. The same principle was followed in *Gidley* v. *Lord Palmerston*,[63] *Palmer* v. *Hutchin*,[64] in *Dunn* v. *Macdonald*,[65] and other cases. Moreover the common law doctrine that an agent, who makes a contract on behalf of his principal, is liable for a breach of an implied warranty of his authority, does not apply in the case of contracts made by a public servant on behalf of the Crown.

Remedy of government servants for wrongful dismissal.—It seems that public servants both civil and military have no remedy either against the crown by *petition of right* or personally against the superior officer who had engaged and then wrongfully dismissed them. In *Dunn* v. *The Queen* [66] the suppliant who had been engaged for three years as consular agent by Sir Claude Macdonald, H. M. Commissioner for the Niger Protectorate and then dismissed within that period, in his petition of right claimed damages for wrongful dismissal. The petition was rejected on the ground that his appointment was during king's pleasure. Thereafter Dunn sued Macdonald personally for damages and that suit was also dismissed, the Court holding in *Dunn* v. *Macdonald*[67] that where a public servant acting on behalf of the crown makes a contract with a person he is not responsible for

63. (1822) 3 Brod and Bing 275.
64. (1881) 6 App. Cas. 619.
65. (1897) 1 Q. B. 565.
66. (1896) 1 Q. B., C. A. 116.
67. (1897) 1 Q. B. 565.

a breach of such contract. In *Gould* v. *Stuart*[68] it was held that the power to dismiss at pleasure, unless otherwise provided by law, was by implication incorporated into every contract of service; and, in *Hales* v. *The King*[69] it was held that even if there was a special contract, the crown will not be bound by it. Only where the public servant is appointed on statutory tenure, during good behaviour as in the case of the Judges of the Supreme Court, the Controller and the Auditor General, the case is different.

Remedy by Petition of Right.—We have seen no *petition of right* would lie in regard to torts, or for acts of negligence either by the Crown or its servants.[70] This remedy is available against the Crown only in (*a*) Cases of property (lands, goods or money) wrongfully taken or withheld, *i.e.*, where the purpose of the petition is to obtain restitution or compensation: (*b*) For damages liquidated or unliquidated, for breach of contract by the Crown and (*c*) For money payable to the suppliant under a grant of the Crown.[71] But no relief will be granted if the suppliant is to blame or any false suggestion is made by him. The procedure is now regulated by the Petition of Right Act of 1860, 23 and 24 Vic., c. 34, Sec. 2. On presentation of the petition, the King, on being informed by the Home Secretary, orders the petition to be endorsed with the *fiat* 'let right be done.' The petition with the *fiat* endorsed on it is then lodged with the Treasury and the Crown has then twenty-eight

68. (1896) App. Cas. 575.

69. (1918) 34 T. L. R. 589 C. A.

70. See *ante*, Ch. XII under "Proceedings against sovereign."

71. See the observations of Cockburn C. J. in *Feather* v. *Queen* 6 B. and S. 293 cited with approval in *Windsor and Apnapolis Co.* v. *The Queen* 11 App. C. A. 615, quoted in Anson, Vol. II, Pt. II, p. 299.

days within which to plead or demur to the petition and thereafter, the matter proceeds as in an ordinary suit with this difference that the suppliant cannot claim discovery against the Crown and in the event of his winning the case, cannot levy execution in the ordinary way.

Where remedy is provided by statute, no petition of right would be allowed. In *Baron de Bode's case*,[72] the petitioner stated that under a convention made with France, the British Government received monies for compensating British subjects whose property had been confiscated during the wars succeeding the Revolution. The petition of right was dismissed on the ground that a statute had been passed providing for the mode of distribution of the monies. Nor would a petition of right lie in regard to what are really Acts of State. Thus in *Rustomjee* v. *The Queen*[73] where by a treaty between the Queen of England and the Chinese Emperor, the Emperor paid to the British Government certain sum of money on account of debts due to British subjects from certain Chinese merchants who had become insolvents after being largely indebted to British merchants, Cockburn C. J. observed that it was too wild a notion to entertain that the Queen thereby became a trustee or agent of her subjects and that the effect of the treaty was to place the fund at the absolute discretion of the sovereign. It was accordingly held that a petition of right would not lie by one of the British merchants to obtain payment of a sum of money alleged to be due to him from one of the Chinese merchants. In fact, barring the statutory exception in the case of the Public

72. De Bode (*Baron*) v. *R.* (1851) 8 Q. B. 208.
73. (1876) 1 Q. B. D. 487.

Trustee, for whose defaults the Treasury is responsible, the Crown cannot be a trustee.[74]

Remedy by Scire facias.—Where damage is caused to the property of a subject by crown grant to another, the remedy was formerly by a writ of *Scire facias* issued either directly by the crown or on the application of the aggrieved party by the *fiat* of the Attorney General. Now, the remedy is by a petition of right under Sec. 5 of the Petition of Right Act of 1860.[75]

Proceedings against judicial, military, naval and other public officers.—For the efficient discharge of their duties, public officers need a certain amount of protection. The immunities and privileges of judicial and other officers have been dealt with in their proper places. As regards *procedure* in regard to suits against public officers for acts done in their official capacity, no suit, under the Public Authorities Protection Act (56 and 57 Vic., c. 61) can be brought more than six months after the act complained of and in case of continuance of injury or damage, after the ceasing thereof, previous notice having to be given before the institution of the suit in order to afford an opportunity to make amends, etc.[77]

Where the Attorney General should be made a party.—In cases where the interest of the Crown is not directly but *indirectly* affected, *e.g.*, in a suit between subject and subject concerning an outlaw's property, where the sovereign is interested as *parens patriæ*, where the king acts as protector of the rights of his subjects, *e.g.*, where there are provisions in a will for general

74. See Ch. and Asq., p. 125.

75. See Thomas's L. Cases, p. 81 (5th Edn.), also Hal., Vol. X, p. 35.

76. See *post.*

77. *Cf.* Similar provisions in Sec. 80-82 of the Indian Civil P. Code.

charitable purposes, the Attorney General must be made a party to the proceedings.[78] A declaratory suit against the Attorney General as representing the Crown may be brought where the aggrieved party apprehends action contrary to law by an administrative authority.[79] If an injury to the public is threatened the public can enforce the right through the Attorney General representing the Crown as *parens patriæ* and in **India**, through the Advocate General under Sec. 114, cl. (2) of the Government of India Act of 1919. Where however interference with a public right also causes special damage peculiar to any individual or a corporation, the plaintiff can sue without joining the Attorney General.[79A]

Summary of proceedings against crown and the executive.—The necessity of such proceedings may arise by reason of the invasion (*a*) of the personal liberty of the subject or (*b*) invasion of right to property. In regard to invasion of personal liberty, the remedy and procedure are afforded mainly by the *Habeas Corpus Acts*.[80] In regard to invasion of right to property, the remedies are by *petition of right* where property is wrongfully taken or withheld and for damages for breach of contract; by writs of *mandamus*,[81] *certiorari* and other prerogative writs; how far such high prerogative writs may now be issued by the High Courts in India has been discussed elsewhere;[82] by *injunction*,[82A] and by

78. Broom's Legal Maxims, p. 50.

79. See *Dyson* v. *Attorney General* (1911) 1 K. B. 410 and *Eastern Trust Co.* v. *McKanzie Manu and Co.* (1915) A. C. 750; see Ghosh's Com. Adm. Law, 615-616.

79A. See *Boyce* v. *Paddington Corporation* (1903) 1 Ch. 109.

80. See *ante*, Ch. VI.

81. See *in re Jatindra Mohan Sen Gupta* 40 Cal. L. J. 44.

82. See *ante*, Ch. III.

82A. See *Bank of Bombay* v. *Suleman Somji* 12 C. W. N. 825 (P. C.).

declaratory suit against the Attorney General that a threatened administrative act is contrary to law.[83] There is no remedy and therefore no proceeding is maintainable against the sovereign personally or in regard to what are called Acts of State or in regard to acts of tort committed by Government servants in their *official* capacity, although personally, they are liable to be sued for damages except in a few exceptional cases such as in the case of judicial, military and naval officers. As regards procedure, government servants enjoy certain privileges in proceedings against them in their official capacity such as in regard to previous notice, limitation, etc., but beyond these under English constitution, there is no special tribunal nor special procedure or law as in France and other continental countries, for dealing with cases where official acts are questioned.

Absence of droit administratif in English constitution.—In England the rule of law admits of no exceptional treatment in the case of official delinquencies. There is no separate tribunal with separate law and separate procedure to deal with cases where the conduct of officials is in question. As pointed out in *Entick* v. *Carrington* English constitution recognises no state necessity and no distinction between state offences and other offences. Of course certain public officers such as judicial officers military and naval officers enjoy a large measure of immunities but this they do in the interest of the public; in the case of judicial officers, in order that justice may be administered freely and independently without fear or favour, and in the case of military and naval officers for the sake of discipline. But this is entirely different from the *droit administratif* of France

83. See Ghosh's Com. Adm. Law, p. 614 *et seq.*

and other continental countries under which there is separate administrative courts and separate law and procedure to deal with the liabilities of *all* state officials based upon the idea that state rights are superior to individual rights and officials as representatives of the nation possess special rights and privileges.[84]

Comparison of Proceedings against the State and State officials in England, America, France and British India.[85]—In Anglo-Saxon countries, under the common law the sovereign or the sovereign State can sue in its courts those subject to its jurisdiction but cannot be sued except when allowed as a matter of grace (by petition of right). The doctrine of non-suability of the State in its own courts is followed equally in England and the United States. In England or in America the idea of the state being a juristic entity, an artificial person capable not only of suing but liable also to be sued as an ordinary corporation is not given effect to as fully as in the continental countries of Europe. Further, in England the State being identified with the King and the King being incapable of doing any wrong, no action for tort would lie against the Crown or state officials for wrongful or negligent acts done in the discharge of official duties, although the officials personally would be liable for such wrongful acts, the plea of state necessity not being permissible. In America where also the English common law is followed State enjoys the same immunity for torts committed by public servants save and except where actions for state torts are allowed by statutory authority, either, under special statutes in regard to particular kinds of torts, *e.g.*, the Workmen's

84. See Dicey, p. 332.

85. See Ghosh's Comp. Adm. Law (T. L. Lec., 1918), Ch. XIII. See *ante*, under "Identification of the State with the King."

Compensation Acts, etc., or under general statutes. General statutes permitting such actions are however interpreted by courts as not to apply to acts of tort committed in the discharge of what are called "governmental functions." Again in America the personal liability of officials for wrongful acts is much less than in England, suits being maintainable only if the state authority on which the official relies is not itself valid and not if the result of the suit be to restrict the state in the exercise of its "lawful powers." In America however as in England no official or private person can set up in defence of an illegal act the command of any superior official be he the President of the Republic or Governor of a State. The same rule of personal liability is followed both in England and America. In France on the other hand the State accepts the liability of its officials for wrongful acts done in the discharge of administrative functions and protects them from personal liability. The remedy of the citizen however is to be sought for not in the ordinary tribunals, the French people being jealous of the interference of the executive by the judiciary, but in the administrative courts under special rules and special procedure. In regard to acts of tort committed for reasons of State policy on political grounds such as public safety, etc., known as *Actes de Gouvernement*, as distinguished on the one hand from mere acts of administration, on the other, from acts done in the State's business dealings with citizens, known in French law as *Actes de Gestion*[85A] and in German law as *Fisc* or *Fiskus* "in which the State appears as the owner of property or the conductor of business enterprises" and in which the State is liable to be sued both

85A. See Willoughby's Public Law (T. L. L., 1923), p. 477.

in contract and tort, no action would lie in France or other continental countries, state necessity being a complete answer in defence. In **British India,** the Government as successor of the E. I. Co. has been given by Parliamentary statute (Section 65 of the Government of India Act of 1858 corresponding to Section 32 of the Government of India Act of 1919) a corporate character for the purposes of suing and being sued in the name of the Secretary of State in Council, and all kinds of suits including suits for tort which could have been brought against the E. I. Co. may be brought against the Secretary of State for India. The section has been interpreted however to exclude suits for tort committed in the exercise of what are called sovereign powers.[86]

86. See *ante* p. 235 *et seq.*; see also Laws of India by A. Eggar, Part III (Government of India), p. 63 *et seq.*

CHAPTER XIII.

THE CHURCH.

Development of the English Church.—(*a*) *Anglo-Saxon period* : The conversion of the English to Christianity began with the landing of St. Augustine in Kent in 597 A.D. The conversion of the people unified them through the bond of religion even before they were politically united. In the Anglo-Saxon period, "the church was the nation in its religious aspect." [1] The king was the most anointed one, a relic of which is still preserved in the coronation ceremony. In administration of justice, the bishop used to sit with the sheriffs in county courts and administer justice to laymen and clergy alike; the Bishops were members of the Witan. Thus the clergy took part in the work of Government and formed an integral part of the state. (*b*) *Norman period* : All this was changed in the Norman period. William the Conqueror separated civil and ecclesiastical courts giving the latter jurisdiction over the clergy and the laity in all religious or spiritual matters. But this separation had an important effect, *viz.*, it soon made the church a distinct body within the State, a thing apart, which it was not, during the Saxon period.[2] The clergy would not submit to the jurisdiction of ordinary courts even when guilty of criminal offences, would not pay taxes or the usual feudal burdens, would legislate for themselves in their own convocations, would look to Rome as the final authority in all disputes, and so on. All this led to frequent quarrels between the clergy and the Plantagenet

1. Anson, Vol. II, Pt. II, Ch. IX.
2. See Anson, Vol. II, Pt. II, Ch. IX.

kings. Henry II wanted the clergy to be tried for criminal offences by ordinary courts, to make them pay the usual feudal burdens, in short, to settle the mutual rights of the king and the church. All this was attempted to be done by the famous *Constitutions of Clarendon* (1164) which mark the first formal claim of the State to control the church. Edward I also tried to curb the power of the clergy. The *Statute of Mortmain* was passed in 1279 which enacted that land granted by any man to the church was to be forfeited to his lord, or, if the lord failed to enforce his claim, to the king. The jurisdiction of ecclesiastical cases was limited to spiritual, testamentary and matrimonial cases and the clergy were compelled to pay taxes on pain of being outlawed. The clergy however still continued to claim '*the privilege of the clergy*' or immunity from the jurisdiction of ordinary courts in regard to criminal offences; to carry their appeals to Rome from the decisions of the ecclesiastical courts; to legislate for themselves in their own Convocations without authority from king or Parliament. (*c*) *After Reformation*: By a series of Parliamentary Statutes chiefly in the reign of Henry VIII, Reformation of the English church was effected. By an Act passed in 1533,[3] appeals to Rome were forbidden; by the Act of Supremacy [4] the king was declared to be the only supreme head of the English church and by the Act of Submission of the Clergy [5] it was declared that (1) appeals from ecclesiastical courts were to lie to the King in Chancery (since 1833, such appeals lie to the Judicial Committee of the Privy Council); (2) that Convocations of the clergy are to be summoned only by the king's writ; (3) that canons are to be enacted

3. 24 Hen. VIII, c. 12.
4. 26 Hen. VIII, c. 1.
5. 25 Hen. VIII, c. 19.

only with king's assent and to bind the laity, should further have the authority of Parliament; and, (4) that canons already in use were provisionally declared to be valid only if not repugnant to common law, statute law or royal prerogative. By later statutes in the reigns of Edward VI (5 and 6 Edw. VI. c. 1) and Elizabeth (13 Eliz. c.12) the forms of worship (Book of Common Prayer) and the doctrines (The Thirty-nine Articles of Religion) were approved and sanctioned by Parliament and the members of the clergy before ordination required to subscribe to them and take the oath of allegiance to the sovereign. Thus from the Reformation "the church was built into the fabric of the state" with the sovereign at its head, instead of being a thing apart independent of the king and Parliament.[6]

Powers of the Sovereign as supreme head of the church.[6A]—Head of the church does not mean that the King is head in regard to spiritual matters but that he is head and supreme constitutionally, the church owing allegiance to him and not to any foreign power or potentate, Pope or anybody else. As head, the sovereign (*a*) exercises ultimate judicial authority in all ecclesiastical matters, now exercised through the Judicial Committee of the Privy Council; (*b*) controls legislation by the convocations; (*c*) convokes, prorogues and dissolves the two Houses of Convocation; and (*d*) appoints, on the recommendation of the Prime Minister, archbishops, bishops and certain other dignitaries of the church.

What is meant by established church.—It means church established by the law of the land. Established church is a religious society under the control of the legislature in the sense that the members thereof cannot

6. See Anson, Vol. II, Pt. II, sec. 11.

6A. See *ante*, Ch. X under 'ecclesiastical prerogatives.'

alter the *doctrines* [7] or *forms of worship* [8] approved and sanctioned by Parliament, without legislative enactment In this sense, says Anson,[9] " law of the church is law of the land " and " the church is built into the fabric of the State."

Ecclesiastical Divisions and ecclesiastical dignitaries.[10]—For ecclesiastical purposes Great Britain is divided into the two provinces of Canterbury and York ; each province is divided into dioceses, Canterbury having twenty-five, and York, ten dioceses, each diocese being presided over by a bishop. There are further divisions of the dioceses into archdeaconries, rural deaneries and parishes. The Archbishop of Canterbury is the Primate and Metropolitan of all England. He is the chief officer in the church, ranks before the Archbishop of York and enjoys the right of crowning the sovereign. Each of the Provinces has a House of Convocation, so that there are two Houses of Convocation, Canterbury and York and each House has two Chambers, upper, consisting of archbishops and bishops, and lower, consisting of the lower clergy. In **India** appointment, delegation of episcopal functions and of jurisdiction are made by letters patent. The Bishop of Calcutta is the Metropolitan Bishop of India but subject to the Archbishop of Canterbury.

Legislative powers of the church.—Before the passing of the Act for the Submission of the Clergy in the reign of Henry VIII the clergy refused to attend

7. The Thirty-nine Articles of Religion were drawn up by Convocation of all the clergy in 1562 and approved by Parliament and the clergy required to submit to them by 13 Eliz. c. 12; now regulated by 28 and 29 Vic. c. 122.

8. The use of the Book of Common Prayer was enjoined on all ministers by the Acts of Uniformity passed in the reigns of Edw. VI and Eliz.

9. Anson, Vol. II, Pt. II, Sec. 11.

10. For further information see Ridges, Const. Law, Pt. V, Ch. I.

Parliament and would tax themselves in order to grant subsidies to the crown.[11] For this purpose they used to meet in their Convocations. Thus originally the sole function of these Convocations was to vote money to the king. Gradually however they usurped legislative functions as well, in regard to making, repealing or altering of canons. Canons not confirmed by Parliament would bind only the clergy while those subsequently affirmed by Parliament would bind the laity as well, being enforced by the refusal of the sacraments. Now the legislative powers of the church are further regulated by the Church of England Assembly (Powers) Act of 1919.[12] The Act has established three legislative houses, *viz.*, (1) The House of Bishops, consisting of the upper houses of the two Convocations or the bishops of both provinces; (2) the House of Clergy consisting of the lower houses of the two Convocations; and (3) a House of Laymen, the members of which are elected from the laity on a principle of popular representation. The Act provides for appointment of legislative and ecclesiastical committees of the Houses on whose recommendations measures are submitted to Parliament, which, if confirmed by resolutions of the two Houses of Parliament, and after being so confirmed receive assent of the sovereign, acquire the force of statutes. The Church of England Powers Act is an example where statute gives power to the two Houses of Parliament to make laws by resolutions of both the Houses.

Rights and disabilities of the clergy.—The clergy like ordinary citizens are subject to the jurisdiction of ordinary courts and can no longer claim the benefit of the clergy. The only privileges clergymen now enjoy are

11. Since 1633, the clergy have been taxed with the laity by tacit consent: see Ridges, p. 316.

12. See Ch. and Asq., p. 130.

(a) they cannot be called upon to serve in any temporal office, or in war, or as jurymen; (b) cannot be arrested under a *civil* warrant during, or while going to, or returning from divine service. On the other hand they are subject to special disabilities and liabilities by reason of their calling. In addition to the ordinary laws of the land they are further subject to canon laws also and to the jurisdiction of the ecclesiastical courts, to special statutes such as the Public Worship Regulation Act of 1874 or the Clergy Discipline Act of 1893. A clergymen cannot be elected a member of the House of Commons, a borough councillor, alderman or Mayor. Again, there are restrictions in regard to his carrying on the occupation of a farmer or trader.[13] A clergyman may also be expelled from the church when found guilty of uncleanliness or wickedness. Under 33 and 34 Vic. c. 91, a clergyman may after giving six months' notice become a layman.

Ecclesiastical Courts.[14]—The principal ecclesiastical courts now existing are: (1) The Bishop's Consistory Court—which tries clergymen for uncleanliness, wickedness, refusal of sacrament to parishioners, etc.; (2) Arches Court—which tries clergymen for doctrinal offences under the Public Worship Regulation Act of 1874 and for certain offences under the Church Discipline Act of 1892, and also hears appeals from the Bishop's Consistory Courts; (3) The Court of the Archbishop—which tries Bishops for ecclesiastical offences; and, (4) The Judicial Committee of the Privy Council—which is the supreme court of appeal in all ecclesiastical matters.

13. See Ch. and Asq., p. 135.
14. For further details see Ch. and Asq., pp. 136-137.

BOOK IV.

The Executive.

CHAPTER XIV.

THE EXECUTIVE IN RELATION TO THE CROWN AND THE SUBJECT.

Executive, what it includes.—In the larger sense, Executive would include not only the political and the administrative but also the military and the judicial departments of Government. In the strict sense however it is usual to exclude the Judiciary and treat that as a separate organ of the State. Of the Executive, some members change with the change of Government or change of Ministry while others are permanent, unaffected by such change. The former comprise the Ministers themselves who are the heads of the various administrative departments of Government while the latter comprise the *staff* of those departments consisting of members of the permanent civil service. This system of carrying on the executive work of the State through a combination of changing Parliamentary heads and non-changing permanent staff so different from " the spoils to the victors " system of America is decidedly more conducive to efficiency and good government.[1]

The Executive in relation to the Crown.—The sovereign is the supreme head of the Executive in England. The Ministers and other officials are servants of

1. See Ridges' Const. Law, p. 199 *et seq.*

the crown and every important act of the State from the summoning of Parliament and the making of treaties down to the appoinment of Ministers and other officials and every important administrative act can be done only by an order of the sovereign issued either as an Order in Council, or Order under Sign Manual, or Order under the Great Seal, as Proclamation, Writ or Letters Patent.[2] Owing however to the growth of customs and conventions due to the increase of the powers of the House of Commons and necessary curtailment and limitation of the powers of the sovereign, the *real* head of the Executive are now the Ministers and not the King. The King no longer takes part in the deliberations of the cabinet; can no longer exercise any prerogative or discretionary power [3] or do any executive act alone by himself. The doctrine of ministerial responsibility requires that every act of the sovereign has to be done through the intervention of some Minister or Ministers who must countersign every order issued by the king and be responsible for the act or order to Parliament and the country, and, be also personally answerable before courts for any illegality that might ensue therefrom. The Ministers settle the general policy of Government in the meetings of the cabinet, in which the king has ceased to attend since the death of Queen Anne, and work out that policy in detail through the agency of the king in the various administrative departments under different Ministers. The king however remains irresponsible both in regard to the general policy and the administrative acts of the departments. "Formerly," says Anson, "the king governed through Ministers but now Ministers govern through king." [4] In the choice of the Ministers too, the king

2. See *ante*, Ch. X.
3. See *ante*, Ch. X.
4. Anson, Vol. II, Pt. II, p. 41.

has no longer a free hand. His choice must be in accordance with the wishes of the country indicated through the party commanding a majority in the House of Commons. The House of Commons having the power to stop supplies at any moment, the king, in order that government and administration may go on, has no option but to choose the leader of the party having a majority in the House of Commons as the Premier, and call upon him to form the Ministry whose members are also therefore appointed on the nomination of the Premier. Thus whether in choosing Ministers or in shaping general policy or in carrying out details of administration the will of the nation expressed through the House of Commons and not that of the sovereign that now really counts. The days of personal rule are gone and the attempt of George III to revive them led to the memorable motion carried in the House of Commons, by Mr. Dunning " that the influence of the crown has increased, is increasing and ought to be diminished." [5] Yet we have seen the king is not a negligible quantity either as the supreme executive or as a power in the present constitution of England and in the words of Lord Birkenhead the prestige and influence of the monarchy have rather waxed than waned in the prudent and conscientious hands of King George.[6]

Ministerial Responsibility.—The Ministers of the king have a threefold responsibility, moral, legal and constitutional. *Firstly*, they have a collective responsibility (moral) to Parliament and ultimately to the electorate in regard to the general policy of the administration and the advice given to the Crown in regard to prerogative and other executive acts. This responsibility is enforced

5. See Ridges' Const. Law, p. 175.

6. See *ante*, Ch. IX.

by a vote of censure or want of confidence in the House of Commons leading to resignation of the Ministry. *Secondly*, the Ministers are personally and individually responsible before courts of justice for any illegal act, criminal or tortious, resulting from any executive order even though such order be under the authority of the king, the command of the sovereign being no valid defence.[6A] This responsibility (legal) follows from the practice that every executive or administrative act of the crown has to be done through the intervention of a Minister or Ministers who thus become personally liable under the general rule of law to which officials as well as ordinary citizens are alike subject owing to the absence of any system akin to the *droit administratif* of France. *Thirdly*, the Ministers although now-a-days are primarily responsible to Parliament are, under the constitution, also responsible (constitutional) to their sovereign who in exceptional cases, can enforce it by the exercise of the prerogatives of veto, dissolution or dismissal.[7] Such prerogatives are however now-a-days seldom exercised. It should however be remembered that although the Executive are responsible to the Legislature, the members of the cabinet being but the executive agents of the legislature, yet owing to the enormous increase of the powers of the Cabinet in modern times, they are clothed for a time at least with a large amount of irresponsibility. They can adopt measures and carry out administrative acts of vital importance to the nation without any *previous* consultation with Parliament. The House of Commons may punish *afterwards* but cannot prevent them beforehand.[8] "The legislative and executive

6A. See *Danby's case*; *ante*, Ch. III, p. 76.

7. See Ridges' Const. Law, p. 186.

8. See Wilson's State, p. 205; see *post* under 'Cabinet.'

powers have," says Anson, "as it were bifurcated, and there is a real dualism in our constitution, the Crown in Parliament and the Crown in Council."[9]

The Executive in relation to the subject.—Unlike France and other continental countries, there is no *Droit administratif* in England and the rule of law and equality of status apply equally to all, executive and non-executive, officials and ordinary citizens. Subject to the immunities and special privileges dealt with elsewhere,[10] the executive in the discharge of their official duties are answerable before ordinary tribunals under the law of the land for the consequences of their acts affecting private citizens. The ordinary courts and the laws of the land protect the citizens as much against illegal treatment in the hands of the executive as in the hands of other citizens. There is no differential treatment by reason of the wrongdoer being a Government official. Thus the relations of the king to his Ministers and of the Ministers to Parliament on the one hand, and the relations of the Ministers and officials generally to the subject on the other, determine the true character of the Executive in England.

Classification of Executive business.—The executive business of the State can be classified as (1) those done in the exercise of the prerogative or the discretionary powers of the Crown, often regulated in part by statutes, such as, in the administration of the army and navy, the conduct of foreign and colonial affairs and the like; and (2) those done in the exercise of statutory powers.

9. Anson, Vol. I, p. 4.
10. See *ante*, Chapters V. and XI.

CHAPTER XV.

THE COUNCILS OF THE CROWN AND THE MINISTERS.

English sovereigns and representative advisory bodies.—In theory, English sovereigns have never acted in matters of State without the advice of a body of representative men.[1] In the Saxon period there was the Witan which was replaced by the *commune concilium* or the assembly of tenants-in-chief of the Norman kings, giving place in turn to the representative assembly of the three *estates* of the realm, the clergy, the baronage and the commons which constituted the Model Parliament of Edward I, and from which again developed the Parliament of modern times. From very early times again within these bigger representative assemblies which used to advise the king in regard to legislation, taxation and other matters of general importance, there used to grow up a smaller group of *permanent* advisers, the *curia* of the Norman kings or the *concilium privatum* or the Privy Council of later times. Coke (beginning of the 17th century) speaks of four councils of the King : (1) The *commune concilium* or Court of Parliament. (2) The *Magnum concilium* or the House of Lords. (3) The Privy Council, and (4) the Council of Law. Hale (close of the 17th century) also speaks of four councils, only, substituting *Concilium Ordinarium* for the Council of the Law.[2] The **curia** of the Norman times is not only the parent of the modern Privy Council but it was also the

1. Anson, Vol. II, Pt. I, Ch. II.
2. See Anson, Vol. II, Pt. I, p. 61.

germ out of which the various judicial institutions and the administrative departments have developed.

Modern councils of the Crown.—The *Magnum concilium* or the House of Lords have ceased to be a collective advisory council of the King in modern times, the Lords only retaining individually the right of access to the king to give him advice, as a relic of the advisory functions of the body as a whole. At present there are only two councils of the crown, the Privy Council and the Cabinet.

The Privy Council.—It grew out of the *curia* of the Norman times. Formerly it was both a consultative and an administrative body. The Privy Council has now ceased to be a consultative or advisory body of the sovereign. Its functions are now mainly confined to formal transaction of the executive acts of the sovereign; in other words, it is the machinery by which the king's pleasure for administrative purposes is mostly notified either (1) by Orders in Council or, (2) by Proclamations.[3] The executive functions which it formerly used to discharge through its different committees have also now passed into the hands of different administrative departments of the Government such as the Board of Trade, Board of Agriculture, etc. There was a time too when it also used to discharge *original judicial* functions as well, for a long time discharged mostly through courts like the Star Chamber, the Court of High Commission or the Court of Requests. Now the functions of the Privy Council mainly are—(*i*) Formal executive acts, *i.e.*, passing of Orders in Council and Proclamations to notify King's pleasure with respect to measures advised by the Ministers, either in the exercise of royal prerogative or under statutory authority. (*ii*) Business transacted

3. See *ante*, Ch. X; Anson, Vol. II, Pt. I, p. 50 *et seq.*

through committees such as the Judicial Committee [4] or the standing committee relating to the Universities of Oxford, Cambridge and the Scotch Universities; and, (*iii*) Other miscellaneous matters such as administration of official oaths, appointment to and resignation of offices under the Crown, selection of Sheriffs, etc. Privy Councillors are chosen by the Crown from amongst near relations of the sovereign, noblemen of high rank, persons who have held or hold high political, judicial or ecclesiastical office, or have distinguished themselves in other spheres. The appointment is more often made as a mark of honour than for actual discharge of the duties of the office. The office of the members lasts for the life of the sovereign and six months after, the old members being generally reappointed by the new sovereign. There is a Lord President of the Council, but in meetings other than of committees, the king usually presides. Three members of the Council form a quorum, and the orders of the council are authenticated by the signature of the clerk to the council.[5]

The Cabinet.—(*a*) *Its rise*: The origin of the cabinet lies in the practice which kings had in former times of consulting particular favourite Ministers of the Privy Council instead of the entire Council itself. Thus Charles II, had his favourite group of Ministers known as the *Cabal* from the initials of their names—Clifford, Arlington, Buckingham, Ashley and Lauderdale. Such a system was naturally resented by the people and the Privy Council, as it tended to increase the personal influence of the king, the doctrine of ministerial responsibility not having then grown up. The practice however continued until through the increase of the power of the

4. See *post*, under 'Judiciary.'
5. See Ridges, p. 170 *et seq*.

House of Commons, the present cabinet system came through conventions, to be developed from the time of the early Hanoverians but more fully since the Reform Act of 1832, the Ministers becoming dependent on the party commanding a majority in the House of Commons. With the growth of the power of the House of Commons, the power of the party commanding a majority in that House necessarily grew, and, in order that administration might go on smoothly ministers had to be selected from that party with their leader as Premier. Thus the present Cabinet system is based on the supremacy of the House of Commons.[5A] Mr. Trail speaks of the Cabinet having passed through four stages or phases of development: 1st, When it consisted of a small irregular body of king's favourites such as was the *Cabal* of Charles II and when it had no particular name: 2nd, When this inner body came to be known as Cabinet but the Privy Council still continued to be the *de facto* and *de jure* adviser to the king: 3rd, When the Cabinet became the *de facto* adviser but not the *de jure*: 4th and the present phase, When it has displaced the Privy Council both as *de facto* and *de jure* adviser [6] thus wholly superseding the *Privy Council.*

(*b*) *Its present constitutional position and functions*: It is now the most important body in the constitution of England but nevertheless is unknown to the law as not being defined in any statute but is the outcome of conventions. By conventions, the consultative and advisory functions of the Privy Council have now devolved upon the Cabinet. It not only advises the Crown in regard to the general policy of government but exercises the royal prerogatives or the discretionary powers of the

5A. See *ante*, Ch. XIV under "Executive in relation to the Crown."
6. See Ch. and Asq., p. 147.

crown, introduces all important legislative measures in Parliament and controls all executive acts and the whole administration by including among its members the heads of the various administrative departments " The Cabinet," says Wilson,[7] "have inherited the ancient prerogatives of the Crown, shape policy towards colonies, rule India, can place troops and naval forces at pleasure " and so on; and all this it can do wihout any *previous* consultation with Parliament. As an example of recent occurrence, recognition of the Soviet government of Russia by Mr. Ramsay MacDonald's Cabinet without sanction of the House of Commons, may be cited. The safeguard lies in its ultimate responsibility to the House of Commons and through it, to the electorate. The appointment and dismissal of the members, the relations of the Cabinet to the Crown on the one hand and to Parliament on the other, the collective and individual responsibility of its members, all are regulated by conventions the whole aim of which, we have seen, is to establish harmony between the Executive and the Legislature by making the former act according to the wishes of the House of Commons representing the nation and thus to secure true representative government. The king no longer attends meetings of the Cabinet and thus cannot directly control the policy of the Government but still has his threefold rights—" to be consulted, to warn and to encourage." Of the threefold responsibility of the Cabinet to Crown, the House of Commons and the electorate, the first is now but nominal, the second is enforced by vote of censure or refusal to grant supplies compelling resignation and the third, by the result of a general election after dissolution of Parliament.

7. See Wilson's State, p. 205.

(*c*) *Its essential characteristics* : In addition to the characteristics noticed before,[7A] *viz.*, (1) Dependence on the House of Commons, and ultimately on the electorate and (2) Collective and individual responsibility of the members, other distinguishing features of the English Cabinet system are, (3) Political homogeneity, *i.e.*, the members are all selected from one party. Under exceptional circumstances there has been departure from this rule, as for instance there was Coalition Ministry during the late war. (4) Co-operation between the Executive and the Legislature. The Parliament or rather the majority party in the House of Commons control through the Ministers the entire administration in the country. Bagehot speaking of the English Cabinet says, " it is a hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part of the State." (5) Secrecy of its deliberations. The ministers are the confidential advisers of the sovereign and the Cabinet secrets cannot be revealed except with the consent of all parties. The Cabinet therefore may be defined as " A secret partisan committee directing policy and administration under the leadership of the Prime Minister, and under the control of the majority in the House of Commons." [7B]

(*d*) *Its membership* : The members of the Cabinet and other Ministers are nominally appointed by the sovereign but really by the leader of the party (Premier) commanding a majority in the House of Commons who is called upon by the sovereign to form the Ministry. The members of the cabinet must all be Privy Councillors and members of one or other of the Houses of Parliament.

7A. See *ante*, Ch. III, p. 87.

7B. See Some Historical Principles of the Constitution by Kenneth Pickthorn, p. 46.

They are the heads of all the important departments of the State; Ministers who are not members of the Cabinet are also members of Parliament and heads of the remaining departments of the executive, the whole administration being in this way brought under control of Parliament. There is no fixed number of the members of the Cabinet the number being regulated by the Prime Minister subject to practice and political exegencies. The Cabinet is now-a-days usually composed of the following Ministers :—

(1) *Prime Minister.*—The office has grown out of conventions and is unknown to the law. The Prime Minister however holds some Cabinet office usually that of the *First Lord of the Treasury*, which has now practically no duties. He is a member of Parliament, generally of the House of Commons, a Privy Councillor, and the head of the cabinet acting as intermediary between that body and the Crown. The members of the Cabinet, apart from their collective responsibility to Parliament, owe individual responsibility to their chief. His duties are multifarious and his responsibilities very great.[8] His chief functions are three—to exercise a general control over the whole executive government; to be the organ of communication between the Cabinet and the Sovereign, and to be the organ of communication between the Cabinet and Parliament.

(2) *Lord President of the Council.*—The appointment is made by a declaration of the King in Council. It is an office of high dignity and honour, next in rank, in the House of Lords, to the Chancellor and Treasurer. The Lord President takes the first place at the council table on the king's right hand.

(3) *Lord Chancellor.*—Appointed by the Crown on the advice of the Prime Minister. Besides being an

8. See Anson, Vol. II, Pt. I, p. 120.

important member of the cabinet, he is the principal legal functionary—President of the House of Lords, of the Court of Appeal, of the High Court and of the Chancery Division and also a member of the Judicial Committee; *ex-officio* Speaker of the House of Lords and an important member of the Privy Council. From the Norman times the office of the Chancellor 'was great alike in Curia and Exchequer.'

(4) *Chancellor of the Exchequer.*—He is now the Finance Minister who controls the revenue and expenditure of the State and presents the budget. He is at the head of the Treasury department; settles the amount of money to be paid out of the Consolidated Fund each year, represents the Treasury in Parliament, prepares the Budget and adjusts taxation; in fact regulates the whole financial policy of the State.

(5 to 10) *The Six Secretaries of State*: (5) *The Home Secretary.*—He has many important functions to discharge such as to advise the Crown in regard to the exercise of the prerogative of mercy, perform several statutory duties under the Naturalization and Extradition Acts, receive Petitions of Right, maintain peace, supervise prisons, reformatories and the Metropolitan Police.

(6) *The Foreign Secretary.*—He regulates the foreign policy; conducts negotiations with foreign powers; recommends appointment of ambassadors to foreign courts; receives foreign ambassadors, appoints consuls, etc.; has an important share in the exercise of the treaty making prerogative of the crown, and so on.

(7) *Colonial Secretary.*[8A]—Settles colonial policy, recommends appointment of Colonial Governors, etc.

8A. In 1925 during Baldwin's ministry the post of a new Secretary of State for the Dominions was created, so there are now *seven* Secretaries of State instead of six. See *post.*

(8) *Secretary of State for* **India**.—Since the assumption of direct sovereignty by the Crown in 1858, the Secretary of State for India has become the most important factor in the machinery for the Government of India. By the Government of India Act of 1858,[8B] the powers and duties relating to the government or revenues of India as were possessed by the East India Company or by the Court of Directors or Court of Proprietors of that Company are vested, subject to the provisions of the Act, in the Secretary of State. There is also a Council called the Council of India consisting of not less than eight and not more than twelve members and the powers and duties of the Secretary of State for India individually, and of the Secretary of State for India in Council, are all defined in the said Act.

(9) *Secretary for War.*—Since 1904 he is assisted by the Army Council of which he is the President. He is responsible to the King and to Parliament for all the duties of the Army Council.

(10) *Secretary for Scotland.*

(11) *Lord Privy Seal.*—No important function.

(12) *Chancellor of the Duchy of Lancaster.*—No important function.

(13) *President, Board of Trade.*

(14) *Minister of Health.*

(15) *President, Board of Education.*

(16) *President, Board of Local Government.*

(17) *Minister of Agriculture.*

(18) *Minister of Labour.*

(19) *Minister for Air.*

(20) *Financial Secretary to the Treasury.*

(21) *First Lord of the Admiralty.*

(22) *The Post Master General.*

8B. Now, Section 2 of the Consolidated Act of 1919.

The Ministry and its Dissolution.—The Ministry consist of the members of the Cabinet and other Ministers who are not such members but who also change with the change of Government. They comprise the Junior Lords of the Treasury and the Admiralty, the Members of the Army Council, the Law Officers of the Crown, the Parliamentary Under-Secretaries of State, etc.[9] *Dissolution* of the Ministry takes place either by resignation following upon the defeat of an important government measure, or the passing of a vote of censure or want of confidence in the House of Commons, or upon a defeat at the polls in the case of a general election. The prerogative of dismissal is now seldom exercised.

The Administrative Departments and the Civil service.—The administrative departments may be classed either as *political* or *non-political*. The former comprise those which have at their head members of the Ministry changing with the change of Government, and the latter, where the heads are members of the permanent Civil Service. But both departments of the executive are manned by a permanent staff composed of the members of the Civil Service. These civil servants hold their posts *durante bene placito* or during pleasure but practically they enjoy security of tenure. They cannot stand for election to Parliament without resigning their office. Their salaries are charged on the annual votes.

9. See Ridges, p. 178.

CHAPTER XVI.

THE ARMY AND THE NAVY.

Armed Forces of the Crown in relation to the rights and liberties of the subject.—The Armed Forces can affect rights and liberties in *four* ways : (1) By being used as a means of oppression and support to the king in the exercise of arbitrary powers. (2) Through impressment or compulsory enlistment. (3) By the members being exempt from ordinary laws and ordinary courts. And (4) on declaration of martial law. The English constitution is now free from the above dangers. The *first* is prevented since the Bill of Rights (1688) which declared maintenance of a standing army in time of peace without consent of Parliament as illegal. A standing army which is a necessity in every State is maintained in England under the Army Act of 1881 which has to be renewed annually by the Annual Army Act. Thus the maintenance, discipline and the very existence of the Army are brought under the control of Parliamentary sovereignty. As regards the *Navy* it is somewhat different. The Navy is not only essential for the defence of the country and its shores but unlike the Army cannot be used by the sovereign to support him in the exercise of his arbitrary powers to the prejudice of the rights and liberties of the people. Parliament has therefore never interfered with the king's power to maintain a permanent Navy. Nevertheless it is indirectly under the control of Parliament, being dependant on it for the annual grant of supply for its maintenance. The numbers of the Naval force are determined by the Admiralty and

its discipline is regulated by the Naval Discipline Acts of 1866 and 1884. As regards the *second* danger, *viz.*, impressment, it is no longer allowed, wrongful impressment being on the contrary, both a civil injury and a crime. During the late German War, however, conscription and military service were made compulsory by statute. Now again, as before the war, recruitment, both for the Army and Navy is by voluntary enlistment. Under common law, however, king has the prerogative of recruiting for the Navy by impressment of sea-faring men, at least in times of war but the prerogative would never be exercised in modern times. As regards the *third* danger, it is avoided by the fact that the members of the Army and Navy are like ordinary citizens subject to the supremacy of law. By being such members they do not cease to be citizens and therefore continue to be subject to all the duties and liabilities of ordinary citizens, to both civil and criminal liability in addition to special duties and liabilities under military or naval law. As regards the *last* or *fourth* danger, *viz.*, interference with the rights and liberties of the people by military authorities during martial law, it is possible only under very exceptional circumstances, *viz.*, when there is war or insurrection and even then the acts of the military authorities can be questioned, unless followed by Acts of Indemnity, by Courts of Justice at any rate, after the state of war is over.

History and development of the British Army.[1]—(*a*) *Saxon period: National levy.*—Every landowner between the age of fifteen and sixty capable of bearing arms was bound to serve in the *fyrd* or national levy for the maintenance of civil order and defence, liable to be called out to suppress riot, pursue criminals or defend the

1. See Anson, Vol. II, Sch. II, Sec. 1.

country in case of invasion; not bound to serve outside. Afterwards known as the *Militia.*

(*b*) *Norman period: Feudal levy.*—It was a cavalry force which the king could raise by calling on tenants to discharge the obligations of their tenure. Service included service abroad and was limited to forty days in the year. It gave rise to the institution of *scutage* (shield money) on payment of which personal service could be dispensed with. Military tenures were abolished in 1661 since when the feudal levy ceased to exist.

(*c*) *During the Plantagenets, Tudors, and Stuarts.*—Impressment and compulsory military service were often resorted to until they were declared illegal in the reign of Charles I.[2]

(*d*) *Since Revolution.*—Maintenance of a standing Army in time of peace without sanction of Parliament, was declared illegal by the Bill of Rights (1688). Now maintained under the Annual Army Act.

Present composition of the Army.—The Army consist of (1) Regular Forces which include (*a*) British, (*b*) Colonial, and (*c*) Indian forces; and (2) The Auxiliary forces of the Crown, re-organised under the Territorial and Reserve Forces Act of 1907. The Territorials are not bound to serve outside the United Kingdom. Whilst under training, or when embodied by royal proclamation they are subject to military discipline. The embodiment of the territorial force, however, cannot, except under pressure of urgent necessity, be carried out without the sanction of Parliament.[3] The two Houses can present an address to veto such embodiment.

2. 16 Car. I, c. 28.
3. See Dicey, Ch. IX, p. 306.

Martial law ; its different meanings.—The different senses in which the expression is used are :

(1) *The law* embodied in the Articles of War issued by the King to maintain discipline in the Army in times of war and *administered in the Court of the Constable and Marshal.* This was the original sense of Martial law.

(2) *Military law.*—It means the code of rules and regulations which governs the soldier and sailor in all times, peace or war and in all places, within or outside the United Kingdom. Military law is embodied in the Army Act, the Naval Discipline Acts, King's Regulations and Army orders. Military law lays down special obligations for soldiers, sailors and officers in their official capacity, without exempting them from ordinary liabilities as citizens ; creates additional offences such as non-payment of a debt of honour, desertion, being drunk while on sentry duty, etc. Only military men are subject to military law and triable by Courts-martial for breach of such law.

(3) *Common law right to maintain King's peace by the exercise of necessary force in times of riot, insurrection or invasion, or to put down violent resistance to the execution of the law* ; in other words, *to repel force by force.* In this sense Martial law is recognised by the English Constitution and is part of the general law of the land. Its foundation rests on *necessity.* Both its introduction and continuance can be justified only by necessity and as soon as such necessity disappears, further use of Martial law would then be ' mere exercise of lawless violence.' [4] The right belongs not only to the Crown and its servants but to every citizen. It is moreover not

4. See Thomas's L. C. (5th Edn.), p. 123.

only a right but an obligation as well, for it is the duty of every citizen to suppress riot, etc.[5]

(4) *Suspension of ordinary law and temporary Government by military tribunals.*—This is the proper sense of the term Martial law. It is "the assumption by officers of the Crown of absolute power, exercised by Military force, for the suppression of an invasion and the restoration of order and lawful authority."[6] In this sense, Martial law is no law at all; it is the negation of law, an exception to the supremacy of law. It is similar to the *etat de siege* or suspension of constitutional guarantees. There is much controversy as to whether Martial law in this sense is based on King's prerogative to maintain peace or on the common law right and duty of all—Crown and subjects alike, to use necessary force to suppress disorder.[7] According to Dicey, Cockburn[7A] and many other eminent authorities English constitution recognises no royal prerogative to declare Martial law, else, they ask where would be the necessity to pass Acts of Indemnity to legalise wrongful acts committed while Martial law remains in force. The Indemnity Acts are in themselves a recognition of the principle that a subject cannot be deprived of his liberty and other common law rights except by an Act of Parliament. The other view is that Martial law can be validly proclaimed in times of war under royal prerogative, the Petition of Right having forbidden it only in time of peace. Whatever may be the basis, prerogative or common law, this is certain that Martial law is controlled in regard to its inception, duration, or extent of the powers of the executive, by the *necessity of the case.* Mere *proclamation* would not

5. See *ante*, Ch. VIII.
6. Stephen's Hist. Crim. Law.
7. See Hal., Vol. VI, p. 403; Thomas's L. C., p. 123.
7A. See observations of Cockburn C. J. in *Rex* v. *Nelson and Brand.*

justify it, for proclamation only gives notice and cannot confer on Government any power which it does not otherwise possess. Justification of Martial law depends only on the country being actually in a *state of war*; whether state of war exists or not is a question of fact, which, if questioned before ordinary Courts, has to be proved like any other fact. In *Eliphinstone* v. *Bedreechand*[8] and in *Exparte D. F. Marais*,[9] it was held that the fact that some civil courts carried on their functions was no conclusive proof that the country was not in a state of war. In *Exparte Marais* the facts were briefly as follows: The petitioner was arrested and detained in custody under instructions from the military authorities during the Boer war at a place near Cape Town where Martial law had been proclaimed. He petitioned the Supreme Court of Cape Town for his release on the ground that his detention was in violation of the fundamental liberties of subjects. The Supreme Court rejected the petition on the ground that civil court could not exercise jurisdiction so long as Martial law lasted. The petitioner thereupon applied to the Privy Council for special leave to appeal from the order of the Supreme Court. It was urged on his behalf that the district where he was arrested was undisturbed, the civil courts exercising uninterrupted jurisdiction and therefore martial law could not be applied; that even if there was a state of war, martial law could not oust the jurisdiction of civil courts which were still administering the law of the land; that existence of martial law is limited by necessity. Lord Chancellor Lord Halsbury in rejecting the petition for leave to appeal held: (1) actual war was raging and the district in which the petitioner was

(1830) 2 St. Tr. N.S. 379.
(1902) A. C. 109.

arrested and to which he was removed were places where martial law had been proclaimed; (2) that the fact that for some purposes some tribunals were permitted to pursue their ordinary course in a district where martial law had been proclaimed, was not conclusive proof that war was not there raging, and (3) that ordinary courts have no jurisdiction in respect of acts which have been done by the military authorities in time of war (*Leges silent inter arma*).

Illegal acts of the military authorities during Martial law if subject to subsequent judicial proceedings.—The correctness of the last proposition laid down by the Lord Chancellor has been questioned by many legal authorities[10] according to whom the true rule is that acts done by military authorities or other persons, and all proceedings and sentences of courts-martial are examinable and may be reviewed by the civil courts if they are open, not only when war is over but also whilst it is actually raging. Even an Act of Indemnity cannot protect the authorities from the consequences of their unlawful acts unless they were *bonafide* and done in the service of the country. In *Wright* v. *Fitzgerald*[10A] the plaintiff was awarded £500 damages against the defendant by the jury in an action for assault and battery. Plaintiff was brutally flogged and maltreated by the defendant who was high Sheriff, without any enquiry as to his guilt at a time when martial law was in force in Ireland. Later on, an Act of Indemnity was passed and thereafter, an application was made on behalf of the defendant for setting aside the verdict of the jury awarding damages against him in the case of

10. See Thomas's L.C. (5th Edn.), p. 125. Professor Dicey points out that the judgment in *ex parte Marais* does not go the length of saying that Courts have no jurisdiction even *after* restoration of peace.

10A. (1799) 27 St. 760 (820).

Wright, but the application was dismissed with full costs.

Martial law by Parliamentary statute.—Where martial law is declared under the authority of Parliament, *i.e.*, by statute, the above observations would not apply as in such cases everything would be regulated by the provisions of the statute itself and there may be no longer any necessity to pass an Act of Indemnity.

Martial law in India.—In **India** from the earliest period of British rule, Martial law has been declared from time to time by Government under statutory powers.[10B] Now the Government of India Act, Section 72 confers sufficient power on the Governor-General to make and promulgate *ordinances* for a period not exceeding six months, in cases of emergency, for the peace and good government of any part of British India.[10C] Under this section, martial law ordinances were passed in the Punjab in 1919 and in Malabar in 1921. By these Ordinances, the Governor-General can declare martial law, suspend jurisdiction of ordinary courts for trial of offenders, substituting special tribunals for their trial,[10D] empower Military authorities to make regulations for public safety and to hold courts of summary jurisdiction. In India also, Acts of Indemnity are usually passed to protect Government officials, civil and military, from legal proceedings.

Military Tribunals.—The Military Tribunals or Courts-martial can try only military men under the procedure laid down in the Army Act and the Naval Disci-

10B. *E.g.*, The Bengal State Offences Regulation (X of 1804), Madras Reg. (VII of 1808), the State Offences Act (Act XI of 1857) and similar enactments all of which have been repealed by the Special Laws Repeal Act of 1922 (Act IV of 1922).

10C. There were similar provisions in previous Parliamentary Acts, *e.g.*, India Councils Act of 1861, etc.

10D. See *Bugga and others* v. *King Emperor*, I. L. R., Lah. 326.

pline Acts. The powers of the Courts-martial are strictly limited by statutes. They can try military men (*a*) for offences against military law, and (*b*) for offences against ordinary criminal law, subject to certain reservations. Serious offences such as murder, etc., cannot be tried by Court-martial if committed in the United Kingdom; nor if committed outside the United Kingdom but within the dominions of the Crown unless the offender is on active service or there is no court competent to try him within 100 miles.[11] Further, a court-martial does not thereby oust the jurisdiction of ordinary courts. The Military Tribunals are :—

(A) **For the Army :—**

(1) *The Commanding Officer*, who can deal with petty offences by inflicting fine up to a certain amount or imprisonment for a limited number of days.

(2) *Regimental Court-Martial*, consisting at least of three officers with at least one year's service as officer; can inflict imprisonment up to 42 days.

(3) *District Court-Martial*, consisting at least of three officers with at least two years' service each; can inflict imprisonment up to two years; cannot try officers.

(4) *General Court-Martial*, consisting at least of five officers with at least three years' service each; can try all ranks and impose any sentence including death and penal servitude.

(5) *Field Court-Martial* may be convened while on active service and where it is impracticable to hold a General Court-Martial.

(B) **For the Navy :—**

(1) *Captain of a ship*, can deal with petty offences and award imprisonment up to three months.

11. Anson, Vol. II, Pt. II, p. 185.

(2) *General Court-martial,* to be held on board a man-of-war and to consist of not less than five or more than nine officers; can award any punishment including death.

Remedy where Courts-martial exceed their jurisdiction.—Courts-martial may exceed their jurisdiction in two ways: (1) When they apply military law to civilians who are not subject to such law, and (2) by misapplying military law in trying military men, for instance, where a soldier is tried by Court-martial for murder committed in England. Remedy in such cases of excess of jurisdiction is by writs of *Prohibition*, of *Certiorari*, or of *Habeas Corpus*,[12] and there is the further remedy by an action for damages.[13] In *Wolfe Tone's case*,[14] the accused, an Irishman, was a civilian who took part in a French invasion of Ireland. He was captured and after being tried by a court-martial was about to be hanged when on a writ of *habeas corpus* he was brought before the Irish King's Bench and discharged on the ground that not being a military man he could not be tried by Court-martial under military law. In *Exparte Erskine Childers*,[15] the application for a writ of *habeas corpus* was however refused by O'Conner, M.R., on the ground that there was a state of war and Childers was appealing for the protection of a civil court, but its jurisdiction was ousted by the state of war which he himself had helped to produce.

Remedy where military tribunals act within jurisdiction.—In cases where jurisdiction of the military tribunal exists but it is alleged that the military law was

12. See Anson, Vol. II, Pt. II, p. 187.
13. See *Heddon* v. *Evans* 35 T. L. R. 142.
14. (1798) 27 St. Tr. 614.
15. (1924) 67 S.J. 128.

enforced wrongly or maliciously or without reasonable and probable cause, civil courts cannot afford any remedy. In such cases civil courts cannot interfere, the acts being such as relate to matters of military discipline which is within the discretion of the military authorities. The only remedy in such cases is what may be had under the military code. In *Sutton* v. *Johnstone*,[16] the plaintiff, a captain, was ordered by the defendant, his superior commanding officer, to slip his cable and engage the French fleet. The plaintiff disobeyed the order for which he was arrested and kept in imprisonment for nearly three years after which he was tried by court-martial and acquitted on the ground that owing to the condition of the ship, compliance with the order was a physical impossibility. The plaintiff thereupon brought an action for damages and the jury gave a verdict for the plaintiff with heavy damages. A motion was made in arrest of judgment in court of Exchequer and that court also decided in favour of the plaintiff. The decision was reversed in the court of Exchequer Chamber and the reversal affirmed by the House of Lords. It was held, that there was 'probable cause' for the prosecution and even if the proceedings in the court-martial had been instituted without probable cause, courts of law would not interfere with the discretion of an officer acting in a matter of discipline. In *Dawkins* v. *Lord Rokeby*,[17] the first suit (there were two suits) was by the plaintiff, a military officer, against his superior officer, for damages for false imprisonment and malicious prosecution before a military Court of Enquiry. The suit was dismissed on the ground that these being matters of military discipline, those entering military service must abide by them. The

16. (1786) I. T. R. 493.

17. (1866) 4 F. and F 806; L.R. 8 Q.B. 255; See *ante*, Ch. VII; see also Thomas's L.C., p. 128.

second suit was an action for libel and slander of the plaintiff committed by reason of Lord Rokeby's evidence before the Court of Enquiry. Blackburn J. directed the jury that the action did not lie, even if the defendant acted *malafide*, with actual malice and without any reasonable and probable cause, the statements complained of being absolutely privileged having been made in course of a judicial proceeding, *viz.*, before a military Court of Enquiry. In *Dawkins* v. *Lord Paulet*,[18] the action was also for defamation by reason of statements alleged to be not merely false but also malicious, intended to be forwarded to the commander-in-chief. The majority of the court held that there was no cause of action as the statements were made in course of military duty.

18. L.R. 5 Q.B. 94; see also *ante*, Ch. VII.

BOOK V.

The Legislature.

CHAPTER XVII.

PARLIAMENT.

Who can legislate.—Power of legislation is now either *original*, or, *delegated*, *i.e.*, under the authority of Parliament, conferred by some statutory enactment. Power of *original legislation* resides—(1) In *Parliament*, the three necessary parties being the House of Commons, the House of Lords and the Crown. (2) In *Crown* alone, by virtue of prerogative, under which Crown can legislate for conquered and ceded territories so long as representative government is not granted to them by Parliament,[1] by Ordinances. Power of *delegated legislation* may be exercised: (1) By the *Crown in Council* by means of Regulations, Orders in Council and Proclamations.[2] (2) By *Resolutions of both Houses of Parliament* as for instance, under the Church of England (Powers) Act of 1919,[3] or under the Emergency Powers Act of 1920.[3A] (3) By *executive and administrative Boards, public and private corporations, public officers etc.* The practice of delegating legislative powers by an Act of Parliament to the executive or to an administrative body to make regulations to carry out the objects of

1. See *ante*, Ch. X, under 'Political Prerogatives'; and see *post*, Ch. XXIII.

2. See *ante*, Ch. VI, under "Suspension of Habeas Corpus Acts," and observations of Lord Shaw in *Rex* v. *Halliday*.

3. See *ante*, Ch. XIII, under "Legislative Powers of the Church,"

3A. See Ch. VI, "Security of liberty in England,"

the Act instead of setting out all the details in the Act itself has been condemned by Professor Dicey as savouring of the *droit administratif* of France, but the practice, whether good or bad, is now frequently resorted to. (4) By *workmen and employers' Associations and Unions* in matters of dispute as to wages, hours of work, etc. Parliament only formally gives effect to the decisions of these bodies. Instances of such *industrial legislation* have become common with the development of the industrial system and is an example of what may be called *involuntary delegated legislation.* (5) By *Courts of Justice;* legislation through judicial decisions is an example of *indirect delegated legislation* carried on with the assent, and subject to the revision of Parliament.[4] "The whole of the rules of equity and nine-tenths of the rules of the Common Law have in fact been made by the Judges."

History of legislation.—Originally the people had no voice in legislation. The king's will was law; *rex was lex.* The people (Commons) were not even represented in the king's advisory assemblies, either in the *Witan* of the Anglo-Saxon times or in the *Commune Concilium* of the Angevin kings. The Crown in Council used to discharge both legislative and executive functions. Separation of the functions took place gradually until legislative functions came to be discharged by Crown in Parliament, and the executive functions by Crown in Council; and we have seen that for a long time even after the separation of the functions, Crown in Council continued to legislate by Ordinance, etc. The difference between an *Ordinance* and a *Statute* consisted in the former being an act of the King in Council, revocable by him; it was temporary and not entered on the Statute Roll; while the latter was an act of the King in Parliament

4. See Dicey, Ch. I.

revocable by Parliament; was permanent and entered in the Statute Roll.[4A] Now of course the king cannot legislate by ordinance except for newly acquired territories. The *successive stages in the development of legislation* may be briefly described as follows: (1) *Legislation by the king in council,* promulgated by means of Ordinances and Proclamations. (2) *Legislation by petition* to the king, the king either assenting to it or refusing it according to his pleasure. (3) *Legislation by bill* passed by the two Houses and assented to by the Crown. This is the modern method but since the passing of the Parliament Act of 1911, the initiation and control of every important legislative measure is in the hands of the House of Commons. Thus legislation in which originally the Commons had no share, is now practically controlled by them.

Mediæval Parliaments, their character.—Although English Parliament in the sense of being a representative assembly dates from the Model Parliament of Edward I, representation in the mediaeval Parliaments was not of the nation as a whole but of the *Estates, i.e.,* orders or classes into which the English people were principally divided, *viz.,* the nobles, the clergy and the commons. The nobles or *the Estate of the Lords Temporal* did not however include the entire feudal nobility but only the bigger tenants-in-chief summoned by Royal writ to sit in Parliament. Thus in England the right to sit in the House of Lords as Councillors of the sovereign, depends, since the days of Edward I on summons and not on mere possession of tenure; in other words *barony is by writ and not by tenure.*[4B] *The Estate of the Clergy* included not only the Archbishops

4A. See Anson, Vol. I, Ch. VI, sec. 2.

4B. See *post*, Ch. XIX.

and Bishops who were members in former times of the *Witan* and the *Commune Concilium* but also the inferior clergy through their representatives. The inferior clergy however soon dropped out of Parliament, the clergy preferring to tax themselves and to legislate for the church in their own Convocation.[4C] The clergy as a separate Estate has thus ceased to be represented in Parliament, only the Archbishops and the Bishops sitting in the House of Lords as Lords Spiritual. The *Estate of the Commons* included representatives from the shires, cities and boroughs, in fact all the diverse elements of the community not summoned by special writ. It excluded only villeins and landless freemen. Mediæval Parliaments lasted only for one session and that usually a very short one. They were generally summoned only when the king was in need of money and wanted consent of Parliament for fresh taxes, the Commons availing of the opportunities to have their grievances redressed by presenting petitions which when accepted by the King, with or without modification, became statutes. A Statute in those days was usually made by the king "on the petition of Commons and with the advice and consent of the prelates and barons and it was not till the fifteenth century that legislation by Bill became the rule." [4D]

Rise and development of Parliament.—The successive stages through which Parliament has passed before reaching its present position may be briefly indicated as follows :

(1) *The Witan* of the Saxon times; a small advisory body consisting mostly of king's nominees; not a representative body at all.

4C. See *ante*, Ch. XIII.
4D. See *ante*, p. 287.

(2) The *Commune Concilium*, spoken of in the Magna Carta; a feudal assembly of the tenants-in-chief (the barons); not a truly representative body, the clergy and the commons not being represented.

(3) *Simon de Montfort's Parliament* of 1265, where the shires, cities and boroughs were for the first time represented.

(4) *The Model Parliament of Edward I* (1295); the first real representative legislature, the three estates of the clergy, the baronage and the commons being summoned. "Parliament," says Anson, "was in its origin, and is still in law, a representative assembly of the three estates of the realm; for all three are still summoned to Parliament."[3A]

(5) *Parliaments as reformed* from time to time under the Representation of the People Acts of 1832[3B] (Reform Act), 1867[3C] and 1884.[3D]

(6) Parliaments *since the introduction of the cabinet system of government* in Sir Robert Peel's time (1834).

(7) *Parliaments since* 1911, *i.e.*, after the introduction of the Parliament Act of 1911.[4]

(8) Parliaments *since* the passing of the Representation of the People Act of 1918.[5]

The above survey of the development of the British Parliament shows that three principles have successively moulded its constitution; *viz.*, the principle of the divine right of kings, the divine right of free holders and the divine right of the people. What further development

3A Anson, Vol. I, p. 49.
3B. 2 and 3 Will. IV, Ch. 45.
3C. 30 and 31 Vic., Ch. 102.
3D. 48 Vic., Ch. 3.
4. 1 and 2 Geo. V, c. 13, S. 2.
5. 7 and 8 Geo. V, c. 64.

is in store nobody can say. Instead of two, the House of Commons is now-a-days grouped under several parties. Again, the influence of workmen's and employers' associations is daily increasing and it is no wonder if real power in the House of Commons passes at no distant date into the hands of the representatives of the various industries voting not as representatives of the nation but as mere delegates of their respective bodies. It has been pointed out by a learned writer that in British Parliament *representation is being changed to delegation* and Parliament is " fast becoming a congress of ambassadors from different and hostile interests.. that representation by special economic and social interests organised into associations is being superimposed on representation by constituencies or geographical areas."

Functions of Parliament.—In the words of Bagehot, " Parliament is the greatest enquiring, discussing and legislative machine the world has ever known." The principal functions of Parliament now are no doubt, to control legislation, finance and administration; for it is Parliament alone which can make laws, impose taxes, or grant supplies. But there are other important functions as well. Its functions are :

(1) *Legislative and Financial.*—These have been discussed in Chapters XX and XXI.

(2) *Judicial and Quasi-judicial.*

(A) *Judicial.*—Parliament as successor of the king's council and the *Curia Regis* can, as *High Court of Parliament*, exercise the following judicial functions :[6]—

(*a*) **Impeachment** of Ministers and high officials by the Commons at the bar of the Lords. It was a trial by the House of Lords as a Court, with the House of Commons as prosecutors. It contributed in no small measure.

6. See Ridges, Cons. Law, p. 237 *et seq.*

to the establishment of the doctrine of **ministerial responsibility** in the English constitution in later times. Proceedings on impeachment do not abate on prorogation or dissolution of Parliament and may be revived by the next Parliament. It has now grown obsolete, the last two cases being those of Warren Hastings (1785-91) and Lord Melville (1805).

(*b*) To adopt the procedure in regard to **attainder.** *Bill of attainder* was an old Parliamentary procedure of exercising judicial authority, ordinarily initiated in the House of Lords. The procedure however was very different from that adopted in Courts of Justice. In times of the Tudors such bills were often passed by subservient Parliaments to punish political offenders and those who incurred the wrath of the sovereign. As the bills were legislative in form, consent of the Crown, Lords and Commons was necessary, to pass them. This also is now obsolete; the last bill passed was in the case of Lord Fitzerald, one of the Irish rebel leaders of 1798.

(*c*) The right of the *House of Lords to try peers* charged with treason and felony. The right dates from the provision in the Magna Carta of trial by one's peers.

(*d*) To try important *Civil actions* as Court of first instance. The case of *Skinner* v. *East India Co.*,[7] was the last case of its kind.

(*e*) The *House of Lords* as successor of the *Curia Regis* acts as the final *Court of appeal* in the United Kingdom.

(B) *Quasi-judicial.*—Either House can take proceedings for contempt against itself; dispose of petitions

7. (1666) 6 St. Tr. 700, also known as ' The *Case of the Jurisdiction of the House of Lords* ' for the case gave a conflict between the two Houses, the House of Commons questioning the claim of the House of Lords to exercise *original* jurisdiction in *civil* cases. It ended in a victory of the House of Commons.

to Parliament; enquire into the conduct of public persons and departments of Government; settle disputed claims to membership of each House, etc.

(3) *Deliberative and Critical.*—Members may discuss matters of national importance; criticise conduct of Ministers; pass resolutions and votes of censure; either House may address the Crown on matters of general policy; both Houses may present joint petition to the King to remove Judges; etc.

The Crown and Parliament.[8]—The Crown has the prerogative to *summon, prorogue* and *dissolve* Parliament. "The Houses meet by Royal invitation; they assemble in the Royal Palace at Westminster; they are opened by Royal permission; they continue in existence and working during the Royal pleasure."[9] But like all other political prerogatives these prerogatives in regard to Parliament are also now subject to conventions and are exercised on the advice of the Ministers.

(1) *Summons*—Parliament is summoned by Royal proclamation followed by writs issued by the Crown office to (*a*) The Spiritual peers (26); (*b*) The Temporal peers of the United Kingdom (714 in 1924); (*c*) Representative Irish peers elected for life (28); (*d*) The Judges and Law officers of the Crown (do not take part in debate); (*e*) The returning officers (Sheriffs for counties, and Mayors for boroughs) for election of members of the House of Commons.

(2) *Prorogation*—It terminates a *session* of Parliament and wipes off all pending business. All bills partly gone through have to be taken up afresh at the new session. Prorogation is different from *Adjournment*

8. See *ante*, Ch. X, under 'Legislative Prerogative.'
9. Anson, Vol. I, Ch. VII.

which only puts off transaction of business for a limited time, effected by a resolution of either House.

(3) *Dissolution*—It may be effected either by an exercise of royal prerogative, or by efflux of time. It terminates the *existence* of a Parliament. Under the Parliament Act of 1911 the life of a Parliament is limited to *five* years. Parliament is not dissolved by reason of the death of the king. Like most other prerogatives its exercise has now been transferred from the Crown to the cabinet in whose hands it is used as a powerful weapon against the House of Commons. Dissolution of Parliament and a fresh election by bringing in new members alter the character of the House of Commons and whenever the Ministry finds that it no longer commands a majority it holds out the threat of a dissolution of Parliament.

The king visits the Parliament only on solemn occasions such as at the commencement or close of a session, on each of which occasions there is a speech from the Throne.

CHAPTER XVIII.

THE HOUSE OF COMMONS.

Parliamentary Franchise.—The Representation of the People Act of 1918 [1] has more or less granted universal suffrage to men and women. Under the Act every voter must be registered as a voter and have his or her name on the register of voters. In order to be entitled to be registered as a voter, the qualifications are: (1) Must be a British subject natural-born or naturalized. *In re the Stepney Election Petition* [2] it was held persons born in Hanover before the accession of Queen Victoria to the throne of the United Kingdom and not naturalized, are, though resident in the United Kingdom, aliens and therefore not entitled to vote at the election of members of Parliament. So long as William IV was king both of England and Hanover, the Hanoverians were not aliens but now on the severance of the crowns, as they owed allegiance to a foreign sovereign, they could no longer be British subjects. (2) Must not labour under any legal incapacity (which arises in case of aliens, infants, lunatics, idiots, or imbeciles, traitors, and felons till they have served out their punishment or been pardoned, persons found guilty of corrupt or illegal practices at a parliamentary or municipal election, peers and holders of certain offices); and (3) In case of *males* to be twenty-one years of age and who have resided or occupied business premises in a constituency for a period of six months terminable either on the 15th of July or 15th of January in any year; in case of *females* to be of the age of thirty and entitled

1. 7 and 8 Geo. V, Ch. 64.
2. (1886) 17 B. D. 54; see *ante*, Ch. IV, p. 96

to be local government electors, *i.e.*, in occupation either as owners or tenants of land or premises of the value of £5 per annum or whose husbands are electors in a local government area. Besides general franchise, *University franchise* has been extended to *males* of twenty-one and *females* of thirty who have received a degree. Six million women have got the franchise under the Act of 1918 and already attempts are being made to amend the Act so as to lower the qualifying age for women; if this be effected then female voters would outnumber male voters.

Members of the House of Commons.—Members are elected by secret ballot for a term of five years. They are paid an allowance of £400 per annum. Since the establishment of the Irish Free State in November, 1922, the total number of seats in the House of Commons has been reduced from 707 to 615; England 492, Scotland 74, Wales 36 and Ulster 13. On the floor of the House of Commons, the Speaker's *right are occupied by the majority* and *the left by the minority*. The Cabinet members occupy the front bench called the *Treasury Bench* on the right, and the leaders of the opposition occupy the front bench on the left, the *two front benches* facing each other.

The Speaker and rules of debate.—On the day the Parliament opens, the Commons on being directed by the Lord Chancellor elect one from amongst them as the Speaker of the House of Commons.[2A] The Speaker rules on points of order, maintains order in the House, names members guilty of disorder, signs warrants of committal for contempt and has a casting vote. He gets a salary of £5,000 per annum. As regards etiquette in debates, the king's name is not to be dragged into

2A. In the House of Lords, the Lord Chancellor is the *ex-officio* Speaker of the House.

debate in order to influence the House, no reference to be made to any matter *sub judice*, or to debates in the House of Lords, members are not to be referred to by name, nor personal or offensive remarks to be made, business is not to be obstructed, seditious or treasonable language not to be used, speeches should not be read out, etc.

Privileges of the House of Commons.—These may be classified under two heads: (A) Those demanded of the Crown by the Speaker at the commencement of each Parliament and granted as a matter of course; and (B) Those not claimed by the Speaker.

(A) *Those claimed by the Speaker are*:—

(1) Freedom from arrest. The members enjoy the privilege during, and for forty days before and after a session of Parliament. It does not extend to treason, felony, breach of the peace, seditious libel or other indictable offence and criminal contempt of court. The House of Commons has to be informed through a letter addressed to the Speaker of the crime for which the member in question is detained from Parliamentary service.

(2) Freedom of speech, secured by the Bill of Rights.

(3) Right of access to the Crown through the Speaker. The right exists collectively to the House and not individually as in the case of members of the Upper House.

(4) Right of having the most favourable construction put by the Crown upon the proceedings of the House.

(B) *Those not claimed by the Speaker are*:—

(1) Right to regulate its own constitution, *e.g.*, to determine questions as to the legal qualifications of its own members, right to expel members, etc.

(2) Right to regulate its own proceedings. This was settled in the case of *Bradlaugh* v. *Gossett*.[3] The plaintiff was duly elected a member for Northampton, but being an atheist he was not allowed to take the necessary oath by the Speaker, and the House, by a resolution, directed the defendant who was the Serjeant-at-Arms, to exclude him from the House until he shall engage not to disturb the proceedings of the House. The plaintiff thereupon brought an action to declare the order of the House as void being beyond its power and jurisdiction and to restrain the serjeant-at-arms from carrying it into effect. The defendant demurred that there was no cause of action and the court allowed the demurrer, holding that " the House of Commons has the exclusive power of interpreting a Statute (in this instance, the Oaths Act by not allowing the plaintiff to take the oath) so far as the regulation of its own proceedings *within its own walls* is concerned; and even if that interpretation should be erroneous, the Court has no power to interfere with it, directly or indirectly."[4] It was further pointed out, following *Stockdale* v. *Hansard*,[5] that the House has this privilege only to regulate the internal management of the procedure within its walls, but it cannot by any resolution alter the law so as to affect rights to be exercised out of and independently of the House; in such case the court will exercise its jurisdiction to see if such resolution was legal. Thus if the House had allowed Mr. Bradlaugh to sit and vote without taking oath, the court could not interfere and restrain him from taking his seat until he had taken the oath; but if the House by a resolution or otherwise had attempted to protect Mr. Bradlaugh against an action for

3. (1884) 12 Q. B. D. 271.
4. *Per* Stephen, J., at p. 280.
5. 9 Ad. and E. 1. See *post*, p. 215.

penalties for having sat and voted without taking the oath and if an action for penalties had been brought, the court would then have full jurisdiction to see if the interpretation of the statute by the House of Commons was correct and to declare that such resolution of the House was beyond its power.

(3) Right to exclude strangers.

(4) Right to prohibit publication of debates.

(5) The right to commit for contempt for breach of its privileges. As part of the High Court of Parliament each House has the power to commit summarily for contempt of its privileges and further it is the sole judge in the matter. It has been held in a series of cases [6] that if the House of Commons commit a person for contempt and that if it does so without stating any grounds save and except that the commitment is for contempt, courts have no jurisdiction to enquire further into the matter on an application for a writ of *habeas corpus*. Sir William Anson is of opinion that if the House gives *reasons* for the contempt and the reasons are arbitrary, unjust and contrary to principles of justice, courts may interfere.[7] The case of *Reg.* v. *Paty* (sequel to *Ashby* v. *White*) and the case of *The Sheriff of Middlesex* (sequel to *Stockdale* v. *Hansard*) show that even when the House of Commons was wrong in regard to its view of privilege and committed persons for contempt of such so-called privilege, courts are helpless and cannot give relief by writ of *habeas corpus*.

Parliament's Privileges and Conflict with Courts.—The privileges of Parliament, whether of the House of Commons or of the House of Lords, being based on

6. (1705) *Reg.* v. *Paty* (case of the *Men of Aylesbury*) 2 Lord Raym 1105; (1751) *Murray's case* 2 Wils. 299; *Burdett* v. *Abbot* (1812) 14 East 1. The case of *the Sheriff of Middlesex* (1840) 11 A. and E. 273.

7. Anson, Vol. I, 188-189.

law (either custom or statute), their limits may be ascertained and defined by Courts of Justice as in the case of privileges of the sovereign or Royal Prerogatives.[8] Privilege is to Parliament what Prerogative is to the Crown. Attempts by courts to determine such limits gave rise to conflicts in the past, between the House of Commons and the Courts or between the two Houses, the House of Lords acting as the highest Court of appeal, Thus after the action in *Ashby* v. *White* [8A] was brought, the House of Commons passed a resolution that Ashby was guilty of a breach of privilege of the House of Commons in having applied to court for relief instead of to the House itself. In the meantime five other Aylesbury men having brought similar actions, were with their legal advisers committed by the House for contempt.[8B] The facts in the case of *Ashby* v. *White and others* are briefly these. Ashby who was duly qualified to vote wanted to vote in an election of burgesses for Parliament for some candidates but was prevented by the returning officers, White and others. The candidates for whom he wanted to vote were however duly elected. Ashby thereafter brought an action for damages against White and others for maliciously hindering him from exercising his right to vote, laying the damages at £200. He obtained a verdict, with £5 damages and costs. On motion in the Queen's Bench in arrest of judgment it was set aside on the grounds amongst others, that it was a parliamentary matter with which courts have nothing to do and that the right of voting is not matter of property or profit and

8. See Anson, Vol. I, p. 181 *et seq.*

8A. 2 Lord Raym 938 (1703) 1 Sm. L.C. 231; 14 St. Tr. 695; see *ante*, pp. 48-49.

8B. (1705) *Reg.* v. *Paty* (case of the *Men of Aylesbury*) 2 Lord Raym 1105.

that its hindrance is merely an instance of *damnum sine injuria* or damage without infringement of any legal right. Holt C.J. the dissenting Judge took a contrary view holding that franchise is not an inconsiderable right interference with which is an injury or infringement of a legal right although without any special damage, *i.e.*, *injuria sine damno,* and gave rise to a just cause of action which can be entertained by courts of Justice. The decision of the Queen's Bench was reversed on writ of error by the House of Lords which upheld the judgment of Holt J. Thus there arose conflict between the two Houses in regard to the privilege of the House of Commons. This case is often cited as an illustration of the maxim '*ubi jus ibi remedium,*' *i.e.*, there is no wrong without a remedy. The maxim however is not true in the sense that there is a legal remedy for every moral or political wrong. "What it really means is that legal wrong and legal remedy are correlative terms and the maxim if reversed, would be more correct, *viz.*, where there is no legal remedy there is no legal wrong."[9] The real constitutional importance of this case as also that of *Stockdale* v. *Hansard* is the recognition of the principle that courts can determine and settle the limits of parliamentary privilege. In the case of *Stockdale* v. *Hansard* [10] a report by Inspectors of prisons containing defamatory statements about the plaintiff was printed and sold outside the House by the defendants by order of the House of Commons. The plaintiff thereupon brought an action for damages. The defence was that the publication was privileged having been made by order of the House of Commons. The House further

9. *Per* Stephen, J., in *Bradlagh* v. *Gosset* 12 Q. B. D. 271 at p. 285; see also Dicey, p. 54.
10. (1839) 9 A. and E. 1.

passed resolutions to the effect (*a*) that the order of the House is ample justification for the sale of any papers, (*b*) that decision of the House of Commons on a question of Parliamentary privilege is final, and (*c*) that Courts cannot decide any question of Parliamentary privilege either directly or indirectly.[11] The main question before the court was therefore whether the resolution of the House declaring that it had the power to do the act complained of (*viz.*, authorize publication of libellous matter outside the House) precluded court from enquiring into the legality of the act. It was held by the court that although no action would lie for things done within the House its order if illegal could not shelter those who carried that illegal order into effect outside the House and that resolution of the House was no bar to an enquiry by a court of justice as to the legality of such act. In other words, the decision was that the House of Commons by mere resolution cannot under the plea of privilege change the law, make libellous matter non-libellous, *i.e.*, make legal what is illegal under the law of the land. Parliament which is supreme can no doubt, change any law but not one of the Houses individually, which is only a part of the legislature. When the sheriff seized the goods of Hansard in execution of the judgment, he was arrested and imprisoned for contempt by a warrant issued by the Speaker.[11A] The House of Commons however soon afterwards saw its mistake and an Act was passed by Parliament, *viz.*, 3 and 4 Vic. c. 9 protecting persons publishing any matter by order of either House of Parliament. If the masterly judgments of Lord Denman and his colleagues in this case had been the other way then, says Cockburn C.J., the rights and

11. See Anson, p. 188.

11A. (1840) The case of *the Sheriff of Middlesex* 11 A and E 273.

liberties of the subject would have been placed at the mercy of a single branch of the legislature.[12]

Parliament Act of 1911 [13] **and the House of Commons.**—The effect of the Parliament Act of 1911 has been to relegate the House of Lords to a subordinate position in matters of legislation. The Act has taken away all legislative power from the House of Lords and vested it in the House of Commons in regard to all *money bills;* and in regard to all *public bills* other than money bills, the Act has taken away from the House of Lords the power of veto, leaving to that House only what is called a *suspensive veto* which can, at the most, prevent a bill from becoming an Act of Parliament for a period of a little more than two years. Under the provisions of the Act if a *money bill* is sent up to the Lords at least one month before the end of the session, and is not passed by the House of Lords within one month, then unless the House of Commons otherwise directs, such bill is to be presented to the Crown and becomes an Act of Parliament on receiving royal assent. Again, if any *public bill* other than a money bill is passed by the House of Commons in three successive sessions and being sent up to the House of Lords at least one month before the end of each session, is rejected by that House in each of those sessions, then the bill may be presented to the Crown and on receiving royal assent becomes an Act of Parliament, provided that two years have elapsed between the date of the second reading in the House of Commons in the first session, and the date on which it passes the House of Commons in the third session.

12. See note in Thomas's L.C. (5th Edn.), p. 42. A movement is on foot to amend the Act of 1911 so as to restore to the House of Lords, some legislative powers.

13. 1 and 2 Geo. V, c. 13, S. 2.

CHAPTER XIX.

THE HOUSE OF LORDS.

Composition of the House of Lords.—There are Peers who are not Lords of Parliament such as the Peers of Scotland or Ireland outside the representative Peers and there are Lords of Parliament who are not Peers, such as the Lords Spiritual and the Lords of Appeal. The House of Lords is composed of :

(1) *Hereditary peers of the United Kingdom who are also hereditary Lords of Parliament.* Their present number (in 1924), excluding minors and peeresses, is 645 (3 Princes of the Blood Royal, 19 Dukes, 27 Marquesses, 125 Earls, 65 Viscounts and 406 Barons). Originally barony was by tenure, but it was settled in the *Birkeley Peerage case* [1] that tenure alone does not itself confer a barony as that would make peerage alienable. It is the writ of summons followed by taking a seat in the House of Lords that confers a hereditary peerage or a hereditary right to sit as Lord of Parliament.[2] A hereditary peer is now created by letters patent followed by a writ of summons to take the seat in the House of Lords.

(2) *Hereditary peers who are not hereditary Lords of Parliament.* They consist of the 16 representative peers of Scotland [3] and 28 representative peers of Ireland.[4] The Scotch peers are elected for each

1. (1861) 8 H. L. Cas. 21.
2. *The Clifton case* (Palmer's Peerage Law in England, p 139).
3. The number is fixed by the Act of Union of 1706, 5 Anne. c. 8.
4. The number is fixed by the Act of Union of 1800, 39 and 40 Geo. III, c. 67, S. 4.

Parliament under a separate Royal proclamation and the Irish representative peers are elected for life.

(3) *Life Lords of Parliament* consisting of the **26** Lords Spiritual (The two Archbishops and twenty-**four** Bishops) and the six Lords of Appeal in Ordinary. These are not hereditary Lords but only so for their lives. The *Lords of Appeal in Ordinary* must be either barristers of fifteen years' standing or must have held some high judicial office. They are appointed by the Crown, receive a salary of £6,000 per annum, are removable like other judges, on a joint address by both Houses and are entitled to sit and vote in the House of Lords for life.

Privileges of the House of Lords.—(1) Freedom from arrest except in cases of treason, felony and breach of the peace.

(2) Freedom of speech.

(3) Individual right of access to the crown.

(4) The right to regulate its own constitution.

(5) Right to commit for contempt in which imprisonment does not terminate with prorogation, as in the case of the House of Commons.

(6) Exemption from service as jurors.

(7) Right to exercise judicial functions :[5] (A) As a court of first instance—to try peers and peeresses for treason and felony; to try impeachments by the House of Commons; to try disputed peerage claims. (B) As a court of appeal—to act as the court of final appeal in Great Britain and Ireland.

Origin of some of the privileges of the Lords.—Some of the privileges such as the hereditary right to act as counsellors of the crown, to form an ultimate court

5. See *ante*, Ch. XVII, p. 290.

of appeal, etc., owe their origin to the fact that the Peers were once members of the *magnum concilium* the ancient Council of the king which passed into the House of Lords. They possess these privileges not as representatives of the baronage but as members of the ancient Council of the king.

6. See Anson Vol I, Ch. III, Sec. 2.

CHAPTER XX.

BILLS AND THEIR PROCEDURE.

Different kinds of bills.—

1. *Public bills.*—These deal with measures affecting the community at large.

2. *Private bills.*—These concern either private persons or deal with such local matters as railways, canals, drainage or the like.

3. *Hybrid bills.*—These affect private interests but are brought in as public bills.[1]

4. *Provisional order bills.*—These confirm orders and schemes made by public departments under statutory powers.

Procedure in regard to Public bills.—Public bills other than money bills and bills dealing with the representation of the people, may originate in either House. *The different stages of a public bill are* :—

1. *Either, (a) Motion for leave to introduce* the bill which is either carried or negatived without debate.

Or (b) After notice, presentation of the bill at the Table without an order of the House.[2]

2. *First Reading.*—The bill is then presented, either at the same or a subsequent sitting, and the question is then put, " that the bill be now read a first time, and that the bill be printed," and a date is fixed for the second reading. There is no amendment or debate at the first reading.

3. *Second Reading.*—The main principles and not details are discussed and the question put " That the bill

1. See Ch. and Asq., pp. 255-256.

2. In the House of Lords, any member may without notice or leave present a bill at the Table.

be now read a second time." The bill may be opposed either by moving an amendment "That the bill be read six months hence" to prevent it from being carried during that session, or by an amendment opposing the bill.

4. *Committee stage.*—After passing through the second reading, the bill is referred to a committee of the whole House, presided over by the Chairman of Committees. Now the bill is considered clause by clause and amendments made.

5. *Report stage.*—When the fact of having passed through committee is reported by the chairman to the House, the bill reaches the Report stage. The bill is now considered in its amended form and further amendments may be made.

6. *Third Reading.*—The question "that the bill be now read a third time" is put, this is the third reading and only verbal amendments can now be made.[3]

7. *Sending on the Bill.*—The Bill is sent to the other House for its assent.

8. *Three Readings in the other House.*

9. *Royal Assent.*—This may be affixed either in person or by commission under the sign manual and Great Seal.

Procedure in regard to Private Bills.—The procedure in regard to Private Bills is somewhat complicated by reason of their affecting private interests. The procedure is therefore quasi-judicial. Notice has to be given to the parties affected and when the bill is referred to a committee, counsel and witnesses may be heard on behalf of the contending parties. Under Standing Orders a petition and a copy of the Bill have to be lodged at the Private Bill office and at the Treasury.

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3. In the House of Lords new clauses may also be added.

CHAPTER XXI.

FINANCE AND MONEY BILLS.

Revenue.[1]—The entire revenue of the State, we have seen, falls under two heads: (*a*) *hereritary or ordinary revenues* of the king now surrendered to the nation in lieu of a fixed annual sum known as the *Civil List;* and, (*b*) the *extraordinary revenues* derived from taxes permanent or annual, imposed by Parliament.

Consolidated Fund.—The entire revenue of the State, *ordinary* (hereditary revenues of the Crown) and *extraordinary* (derived from taxation) is paid into what is called the *Consolidated Fund* which is the Government account at the Bank of England.

Control of Finance by the Crown and the Commons.[2]—With the Bill of Rights the power of the Crown to impose taxes independently of Parliament came to an end. Now all legislation for grant of public money out of the Conslidated Fund, or for imposition of new taxes, *i.e.*, all Money Bills are under the entire control of the House of Commons. Money bills can originate only in the House of Commons, and the Lords can neither veto nor amend them but only assent which if they do not do, the bills are sent over their heads to the King for royal assent.[3] Although such bills originate in the House of Commons, they can be introduced only on the recommendation of the Crown expressed through its

1. See *ante*, Ch. XI, under "Revenue Prerogatives."
2. See Anson, Vol. I, Ch. VI, Sec. III.
3. Parliament Act of 1911 (1 and 2 Geo. V. c. 13).

responsible Ministers. The Crown as the supreme head of the Executive must first demand money and then only can the Commons grant it. In the words of Sir Erskine May, " The Crown demands money, the Commons grant it, and the Lords assent to the grant; but the Commons do not vote money, nor impose or augment taxes unless required by the Crown through its constitutional advisers."[4] Further, no money even when granted by the Commons, can be applied by the Treasury in defraying the expenses of the public services without the authority of an order under the sign manual.[5] Before a single penny of the public revenue can be spent, the House of Commons has to determine (*i*) what grants are to be sanctioned, and for what purposes; (*ii*) from what source the money for the grants to come; and (*iii*) how the supplies granted are to be appropriated by the various departments. The procedure for this is embodied in Standing Orders.

Procedure in the House of Commons in regard to Money Bills:—

(I) A committee of the whole House called the **Committee of Supply** considers the estimates for the expenditure of the ensuing year, and votes the requisite grants of money.

(II) Then another committee of the whole House, the **Committee of Ways and Means** passes resolutions that the sums of money voted do issue out of the Consolidated Fund. This Committee has another important function, *viz.*, if it finds the Consolidated Fund to be inadequate to meet the requisite grants, to pass resolutions that taxes (other than the permanent ones) be imposed.

4. May, Par. Practice (11th Edn.), p. 545.
5 See Ridges, Const. Law, p. 90.

(III) At the end of each financial year, two Acts are passed, *viz.*, the **Appropriation Act** which settles what sums are to be paid out of the Consolidated Fund to the various Departments; and **Finance Act** which embodies the resolutions of the Committee of Ways and Means in regard to taxation. As these Acts are passed at the end of the year, supplementary estimates are presented from time to time, if money be wanted in the meantime to carry on the administration and these are voted in the Committee of Supply (known as '*votes on account*'), provided for in the resolutions of the Committee of Ways and Means, embodied in Consolidated Fund Bills and passed as **Consolidated Fund Acts** and finally embodied in the Appropriation Act.

BOOK VI.

The Judiciary.

CHAPTER XXII.

THE SUPERIOR COURTS, THE JUDGES, AND THE JURY.

Development of the Judicial System of England.—The general courts of the kingdom have been combined and consolidated under the name of the Supreme Court of Judicature by the Judicature Acts from 1873 to 1910.[1] The Superior Courts however owe their origin to the *Curia Regis* of the early Norman times. The *Curia Regis* either as King's Court or King's Council was the prolific germ from which sprang in later times not only the superior courts, but also specific departments of administration on the one hand, and the Privy Council or a body of King's Councillors to advise him on matters of state, on the other. So far as its judicial functions were concerned, the *Curia Regis* at first used to sit collectively and accompany the king in his movements. In 1178 Henry II established a committee of five of its judges to sit in one fixed place and to hear the pleas of the Crown —this was the origin of the court of *King's Bench*. By the time of the Magna Carta, the *Curia* had split up into three divisions, the *Exchequer, the King's Bench* and *the Common Pleas*, and by Sec. 17 of the Charter it was declared that the Court of Common Pleas was also to sit at a fixed place. The reign of Edward I (1272-1307)

1. For the Acts, see Hal., Vol. IX, note to para. 106. See Supreme Court of Judicature (Consolidation) Act of 1925 (15 and 16 Geo. V, Ch. 19).

not only saw the first truly representative legislature (the Model Parliament) but also a thorough organisation of the judicial institutions of the country, for which he is called ' the English Justinian,'[2] which remained more or less unaltered up till the Judicature Act of 1873. From the time of Edward I, the Superior Courts became quite distinct from and independent of each other. When the three Common Law Courts separated from the *Curia Regis* there was still *a residuary judicial power in the Crown*. In exceptional cases when the Courts failed to give remedy the king on petition presented through the Chancellor, would, out of grace, redress the grievance. This residuary judicial power of the Crown gave birth to the *Court of Chancery* on the one hand and on the other, to the appellate jurisdiction of the *House of Lords* (Appeal to the Crown in Parliament) and of the *Privy Council* (Appeal to the Crown in Council), the latter jurisdiction being transferred to the *Judicial Committee of the Privy Council* by the Act of 1833. By the Judicature Act of 1873 there was fusion of the jurisdictions of all the superior courts in the Supreme Court of Judicature except that of the Judicial Committee of the Privy Council.[3]

The Supreme Court of Judicature.—It is divided into two parts which are really two distinct courts, *viz.*, (I) *The High Court* possessing original and appellate jurisdiction; and (II) *The Court of Appeal.*

I. *The High Court.*—The jurisdictions possessed by the Superior Courts of Chancery, Queen's Bench, Common Pleas, Exchequer, etc.,[3A] have been transferred to the High Court. It thus exercises a general *Civil*

2. Ridges, Const. Law, p. 231.
3. See Anson, Vol. II, Pt. II, Ch. X.
3A. See Sec. 18 of 15 and 16 Geo. V, Ch. 49.

jurisdiction, as a court of first instance in respect of all causes of action of any amount. The original *criminal* jurisdiction of the High Court extends over all indictable offences against the law of England. Offences by Colonial Governors, Governor-General of India, Lieutenant Governors, High Court Judges and other public officers in India are triable in the King's Bench Division.[3B] In its appellate jurisdiction the King's Bench hears appeals from county courts and other inferior courts of record. The High Court consists of the Lord Chancellor, the Lord Chief Justice of England, the President of the Probate, Divorce and Admiralty Division and the puisne judges of the several Divisions.[4] The Lord Chancellor or, in his absence, the Lord Chief Justice acts as President of the High Court. The Lord Chancellor may request any Judge of the Court of Appeal or any ex-judge of the Supreme Court to sit and act as a judge of the High Court, with the consent of such judge, on behalf of any judge who is absent through illness or other cause. The High Court acts in three Divisions, *viz.*:

(*a*) *The King's Bench Division;* (The King's Bench, Common Pleas, Exchequer and the Bankruptcy Court are all now consolidated into the King's Bench Division). It consists of seventeen puisne judges with the Lord Chief Justice as president.

(*b*) *The Chancery Division;* consists of six puisne judges and the Lord Chancellor as president

(*c*) *The Probate, Divorce and Admiralty Division;* consists of two puisne judges and a president.

II. *The Court of Appeal.*—To this Court, the appellate jurisdictions formerly possessed by the Lord

3B. See Hal., Vol. IX, para. 111.

4. Hal., Vol. IX, para. 132. See 15 and 16 Geo. V, Ch. 49, sec. 2 (1).

Chancellor and the Court of Appeal in Chancery when exercising appellate jurisdiction, by the Exchequer Chamber, etc., have been transferred.[4A] It thus exercises a general appellate jurisdiction in civil cases from the decisions of the High Court. Every order or judgment of the High Court with a few exceptions, may be reviewed by the Court of Appeal.[4B] It consists of five ordinary Judges of the Court of Appeal, called Lords Justices of Appeal, and the *ex-officio* judges. The *ex-officio* judges of the Court of Appeal are the three Presidents of the three Divisions of the High Court,—the Lord Chancellor, the Lord Chief Justice and the President of the Probate, Admiralty and Divorce Division, the Master of the Rolls, and any Lord of Appeal in Ordinary who at the date of his appointment would have been qualified to be appointed an ordinary judge of the Court of Appeal, or who at that date was a judge of that Court. The Lord Chancellor is the president of the Court of Appeal.

The Court of Criminal Appeal.—This was established by the Criminal Appeal Act of 1907.[4C] It consists of the Lord Chief Justice of England and all the Judges of the King's Bench Division, any three or an uneven number of whom form a quorum. It has superseded the former Court of Crown Cases Reserved and the proceedings in the King's Bench Division on writs of error from courts of assize or from the Central Criminal Court. It entertains appeals by persons convicted on indictments, etc., if any question of law is involved and, with leave of Court, if question of fact is

4A. See Supreme Court Judicature (Consolidation) Act, 1925, Sec. 26.
4B. See *Ibid*, Sec. 27.
4C. 7 Ed. VII, c. 23; amended by 8 Ed. VII, c. 46 s.1. See Hal., Vol. IX, para. 189.

involved. Its decisions are final unless certified by the Attorney General, as involving important question of law when further appeal would lie to the House of Lords.

Courts of Final and ultimate Appeal.—

(1) *The House of Lords.*—(I) An appeal lies [5] to the House of Lords from any judgment or order of the Court of Appeal in England, and of any Court in Scotland or Ireland from which an error or appeal lay to the House of Lords by common law or statute. (II) An appeal also lies [6] from a decision of the Court of Criminal Appeal when certified by the Attorney General that it involves a point of law of exceptional public interest. At the hearing of appeals before the House of Lords at least three Lords of Appeal or Law-lords as they are called, from amongst the following persons, must be present, *viz.*, (1) The Lord Chancellor : (2) The Six Lords of Appeal in ordinary : and (3) Such peers as have held high judicial office. The lay peers have theoretically the same right to vote on judicial questions as on other questions, but this right has now fallen into disuse. The Lord Chancellor, if present, presides over the judicial deliberations of the House in appeals.

(2) *The Judicial Committee of the Privy Council.*—It was constituted by the Parliamentary statute of 1833 [7] by which the powers of the Crown in Council to hear appeals, etc., were transferred to this body. The form of the judgments, as an advice tendered to the Crown is a relic of the days when judicial function was discharged by the King's Council of Ministers. The Judicial Committee now consists of the Lord President,

5. Appellate Jurisdiction Act of 1876 (39 and 40 Vic. c. 59).
6. Crim. Appeal Act of 1907.
7. 3 and 4 Will. IV, c. 41, amended by the Appellate Jurisdiction Act of 1887 (50 and 51 Vic. c. 70).

the Lord Chancellor, Six Lords of Appeal in Ordinary, former Judges of Superior Courts in the colonies, not exceeding seven, and former Judges of the High Courts in India, not exceeding two. Three of these would form a quorum. Its functions are :—

(1) To hear appeals from Ecclesiastical Courts, Channel Islands and British Courts abroad, *i.e.*, from all Courts outside the United Kingdom. The king is supreme over all persons and courts within the Empire and a right of appeal in all cases, civil and criminal to the King in Council exists from the highest civil court of each colony, province, state or possession, whether it be a court of error or not, except so far as the prerogative in this behalf has been surrendered.[8] Now-a-days in the Dominions of Canada, Australia, South Africa and the Irish Free State, it is only cases involving constitutional questions such as those arising between the federal and the individual States that usually go up to the Privy Council. In Canada and Australia the parties have under the Constitution, the further option to appeal either to the Privy Council or to their own Supreme Court. As a result of the last Imperial Conference recognizing full sovereignty of the Dominions the jurisdiction of the Privy Council over them will still further be curtailed, if not altogether abolished.

(2) Any other matter as the Crown may choose to refer to the Judicial Committee for hearing or consideration (sec. 4). The scope of this section is very wide and various questions of constitutional importance arising in any part of the British Empire have been from time to time, referred to the Judicial Committee for its decision.

8. Hal., Vol. IX, para. 52; see *post*, p. 248. For *new* rules regarding practice and procedure in the Judicial Committee see Cal. L. J., Vol. 42, p. 19n (notes).

Functions of the Judges of the Superior Courts.—

(1) *To interpret law.*—This is the primary function. Courts none the less *indirectly legislate* through the judicial decisions. English common law most rapidly developed through case law 'within a century from the accession of Henry II (1154) from which dates the organisation of English judicial system to the accession of Edward I (1272).' Law broadens from precedent to precedent and we have seen that English constitutional law is essentially judge-made law.

(2) *To exercise control over inferior courts.*[9]—This is done (*a*) By the Prerogative writ of *mandamus* directing inferior court to do some act: (*b*) By the Prerogative writ of *Prohibition* stopping proceedings in inferior courts: (*c*) By the Prerogative writ of *Certiorari*, removing proceedings to the King's Bench and (*d*) By writ of *error* for some error of law or fact on the face of the pleadings.

(3) *To control the Executive* and the whole administration. This is effected mainly through the writ of *habeas corpus.*[10]

(4) *To try offences committed by Colonial Governors and public officers abroad;*[11] and offences committed by the Governor General of India, Governors, Lieutenant-Governors, etc.[12]

(5) *To exercise disciplinary jurisdiction over counsel, solicitors*, etc.

(6) *To make rules to regulate the practice and procedure of the court.* This is now vested in the Rule

9. It is the jurisdiction of the King's Bench.
10. See *ante*, Ch. VI.
11. 11 Will. 3 c. 12; jurisdiction of the King's Bench.
12. See Sec. 127 of the Government of India Act of 1919.

Committee and the rules to be placed before both Houses of Parliament.

(7) *To perform certain executive acts* through court officials such as ordering summons, arrest, attachment, sale, etc.

Immunities and privileges of Judges.—

(1) *Judicial Immunities.*[13]—We have seen Judges of Superior Courts (Courts of Record) enjoy almost absolute immunity from civil action and criminal prosecution for acts done or for omissions in their *judicial* capacity. The principle was laid down so far back as 1451 and has ever since been followed. It is for public good that the " judges are allowed to enjoy such large immunity. Independence of the judges is essential for proper administration of justice. In *Hamond* v. *Howell* [14] which arose out of *Bushell's case*,[15] the facts were briefly as follows. After the disposal of Bushell's case, Hamond who was one of the jury with Bushell who had acquitted the accused and therefore committed for contempt by the Recorder, brought an action of false imprisonment against the Recorder but in this case the same judge Vaughan C.J. who had tried Bushell's case held that an action will not lie against a judge for what he doth judicially though erroneously; and the Court was further of opinion that the bringing of this action was a greater offence than the fining of the plaintiff and committing him for nonpayment. The principle laid down by the Court of Appeal in the case of *Anderson* v. *Gorrie and others* [16] goes further and it was held that no action would lie for acts done or words spoken by a

13. See *ante*, Ch. V, p. 116.
14. (1678) 2 Mod. 218.
15. (1670) 6 St. Tr. 999 ! Vaughan 135. See *post*, p. 325.
16. (1895) 1 Q. B. 668; 71 L. T. 382.

judge in the exercise of his judicial office even if his motive be malicious and the acts or words are not done or spoken in the honest exercise of his office. This was an action brought in England against three Judges of the Supreme court of Trinidad for damages for committing the plaintiff to prison for default to find bail to appear before one of the judges to be examined. The jury found that Cook one of the judges had acted oppressively and maliciously to the prejudice of the plaintiff and assessed the damages at £500. In spite of the verdict, Lord Coleridge C.J. directed judgment to be entered for the defendant on the ground that the suit was not maintainable. On appeal, the judgment of the Lord Chief Justice was affirmed and the Court of Appeal held as above. The judges enjoy the immunity even when they act without jurisdiction but without the knowledge or means of knowledge which he ought to have availed of, the burden being upon the plaintiff to prove such knowledge of such want of jurisdiction. It was so held by the Privy Council in the case of *Calder* v. *Halket* [17] in an appeal from the Supreme Court in Calcutta. In this case the plaintiff who was a European was arrested under warrant by the defendant, a Magistrate having jurisdiction over Indians only. The plaintiff thereupon brought an action for assault and false imprisonment in the Supreme court and the suit was dismissed. The appeal to the Privy Council was also dismissed on the ground that it was not proved that the defendant knew or had means of knowing that the plaintiff was a European and that the onus of such proof lay on the plaintiff. If such want of jurisdiction be proved to be within the knowledge of the judge, there would be no immunity and the judge would be liable as

17. (1839) 3 Moo. P.C.C. 28.

was held in *Houlden* v. *Smith.*[18] In this case the judge was a county court judge who like the Judges and Magistrates in *India*[19] now enjoy many statutory immunities. Magistrates and justices of the peace enjoy lesser immunity and generally speaking, they would be liable for acts done without jurisdiction, and for acts within their jurisdiction but without reasonable and probable cause.[19A] As regards judges of inferior courts, there is no presumption of jurisdiction, the onus being on the judges to prove such jurisdiction.[19B]

Exceptions to judicial immunities.—There are only two exceptions : (*a*) When knowledge or means of knowledge of want of jurisdiction is proved;[20] and (*b*) When the judge refuses a writ of *habeas corpus* in vacation.[21]

(2) *Power to punish contempt of court by summary proceedings.*—Like judicial immunities, this power is also not for the benefit of the judges but for the benefit of the public, *viz.*, to protect the public from the mischief of undermining the authority of the tribunal or interfering with the administration of justice.[22] If a judge is libelled which does not interfere with administration of justice, the judge has only the right of an ordinary action for libel like any other citizen and cannot take contempt proceedings. Contempt of Court is defined by Lord Russell, C.J., as " Any act done or writing published which is calculated to bring a court or a judge into contempt, or to lower his authority, or to interfere with the

18. (1850) 14 Q. B. 841.
19. See *post.* See Judicial Officers' Protection Act (XVIII of 1850), and Sec. 197 of the Criminal Pro. Code.
19A. See Thomas's L.C. (note), pp. 152-153.
19B. (1905) *Barret* v. *Kearns* 1 K.B. 504.
20. *Houlden* v. *Smith* (1850) 14 Q.B. 841.
21. 31 Car. II, c. 2, s. 10 (Habeas Corpus Act).
22. See Hal., Vol. VII, para. 603 *et seq.*

due course of justice or the lawful process of the Court."[23] Contempt may be either, (*i*) Criminal contempt, consisting in words or acts obstructing, or tending to obstruct the administration of justice, or (*ii*) Contempt in procedure, consisting in disobedience to the judgments, orders, or other process of the court, and involving a private injury.[24] Criminal contempt may again be either in *facie curiæ*, *i.e.*, committed in the face of the court or committed outside courts. Superior Courts of Record [24A] have an inherent jurisdiction to punish criminal contempt summarily whether committed in *facie curiæ* or outside, by committal or attachment; and ' as the King's Bench has a general superintendence over all crimes whatsoever and watches over the proceedings of inferior courts, not only to prevent them from exceeding their own jurisdiction or acting contrary to law, but also to prevent persons from interfering with the course of justice in such courts, it follows that the High Court can punish as contempt by summary proceeding, acts amounting to interference with the course of justice in connection with a criminal case pending in a lower court.'[25] As to whether the **High Courts in India** have the power to commit a person for contempt of a subordinate criminal court in the muffusil, there is difference of opinion. In the case of *Legal Remembrancer* v. *Moti Lal Ghosh* [26] the learned judges (Jenkins, C.J., Stephen and Mookerjee, J.J) held that such power was not possessed either by the Supreme Court or the Sudder Dewany or the

23. (1900) 2 Q.B. 36 (40).
24. Hal., Vol. VII, para. 603.
24A. " Every Court of Record is King's Court and is created either by Act of Parliament, Letters Patent, or prescription "; see 41 Cal. 173 at p. 206.
25. Hal., Vol. VII, para. 637; Rex. *v*. Davies (1906) L. R. 1 K. B. 32
26. 41 Cal. 173.

Sudder Nizamut Adwalat and therefore there is no such power in the High Court of Calcutta which has inherited the jurisdictions and powers of those Courts. The Bombay and the Madras High Courts on the other hand hold that as possessing the powers of the King's Bench Division, the High Courts in India can also protect courts subordinate to them against contempt.[27] This difference of opinion in regard to the inherent powers of the High Courts in **India** to punish contempts of inferior courts has led to the recent introduction of a Bill in the Legislative Assembly, empowering the High Courts to punish such contempts.. The **Indian Legislature** has now passed the Contempt of Courts Act [27A] and under it the High Courts established by Letters Patent are given the same jurisdiction, powers and authority in accordance with the same procedure and practice, in respect of contempts of *Subordinate Courts* as they have and exercise in respect of contempts of themselves, save and except where the contempt of the subordinate Court amounted to an offence punishable under the Indian Penal Code; and the *Chief Courts* are given the same jurisdiction, powers, etc., in respect of contempt of *itself* as are possessed by the High Courts. The Criminal P. Code also contains provisions for taking cognizance of and punishing certain cases of contempt, such as intentionally omitting to produce a document, refusing to take oath or answer questions, intentionally insulting or interrupting a public servant sitting in a judicial proceedings, etc., committed in the view or presence of any Civil, Criminal or Revenue Court.[27B]

(3) *Not removable except on a joint petition of both Houses of Parliament.*—This was effected by the Act of

27. Emperor *v.* Balkrishna 46 Bom. 592.
27A. Act XII of 1926.
27B. See Secs. 480-487 of the Criminal Code.

Settlement [28] before which they were removable at the pleasure of the Crown which led to the subserviency of the judges and frequent miscarriage of justice in the time of the Tudors and Stuarts. The judges of the Supreme Court now hold office during good behaviour and this privilege like the other privileges of judicial immunity and power to commit summarily for contempt is intended for the good of the litigants and the public, *viz.*, proper administration of justice by securing independence of the judges. Judges of inferior courts and Magistrates hold office during king's pleasure (*durante bene placito*) and are removable by the Lord Chancellor for inability or misconduct.

(4) *Other privileges.*—The judges of the Superior Courts enjoy some other privileges; *e.g.*, to slay the chancellor or a judge of the King's Bench would be treason under the Treason Act of 1352; to threaten a judge while sitting would be high misprision; to slander would be indictable as *scandalum magnatum*, and so on.

How independence of judges was interfered with in former times.[29]**—**

(1) By the king sitting in person as judge. This was stopped by the *Case of Prohibitions* [30] in which Coke, as mouthpiece of all the judges, laid down that the king could not himself adjudicate either between Crown and subject or between subject and subject.

(2) By direct interference by the Crown as in the trial of Felton for murder of Buckingham.

(3) By secret tampering under the plea of consultation with the judges.

28. 12 and 13 Will. III, c. 2.
29. Sec. Kelke pp. 43-44.
30. 12 Rep. 63 (1607); see Thomas's L.C., p. 141.

(4) By removal of judges who incurred the displeasure of the king.

Remedies against miscarriage of justice.—As regards errors of law, the remedy is provided by appeals, revisions, etc. As regards corruption, incompetency, etc., the remedy in case of the judges of the superior courts is by a joint address to the crown by both the Houses of Parliament for their removal. In the recent libel case of *O'Dwyer* v. *Sankaran Nair*, Justice McCardie in summing up the case to the jury made some most objectionable and uncalled for observations on the report of the Hunter's Commission and other political questions connected with the martial law in the Punjab, which were not before him for trial. Mr. Lansbury, M.P., wanted to bring in a motion for an address for the removal of the judge but on the then Prime Minister Mr. MacDonald pointing out that the words of the judge however unfortunate did not amount to moral delinquency, the matter was dropped.

Independence of the Jury.[31]—Independence of the jury so essential for the safety of the rights and liberties of the people was, like the independence of the judges, often interfered with in former times specially in Tudor and Stuart times. In cases of unwelcome verdict the jurors were liable to be punished in various ways :—

(1) Under a writ of *attaint*. It was a common law writ under which the verdict of a jury in a *civil* case could be reversed by a subsequent trial before twenty-four jurors and the original jurors punished with imprisonment and forfeiture of all their property and became *tainted* or infamous ever afterwards. The writ was abolished in 1826.

31. See *ante*, Ch. VI, under "Trial by Jury."

(2) By proceedings in the Court of Star Chamber and the Courts of High Commission. In these courts the procedure was arbitrary, no records were kept, no jury, judgment was discretionary and sentence was often severe. Thus they naturally became very unpopular and were abolished in 1640.

(3) By infliction of a sentence of fine and imprisonment by the presiding judge for giving what was considered to be 'perverse' verdict, *i.e.*, verdict against evidence or against the direction of the judge. This was put an end to by the decision in *Bushell's case*[32] which has firmly established the rule of independence of the jury. The facts are briefly as follows. Two Quakers, Penn and Mead were tried on a charge of preaching in a London street, at the Old Bailey Sessions. Bushell and others were the jury in this case and the accused were acquitted by them. Thereupon they were fined by the Recorder and on default of payment committed. On a motion for *habeas corpus*, the return was that the prisoners were committed for giving verdict contrary to manifest evidence and contrary to the direction of the court on point of law. Vaughan C.J. held that the return was insufficient and verdict against the evidence or direction of the Court was not sufficient cause to fine a jury or to commit.

2. (1670) Vaughan 135; 6 St. Tr. 999.

BOOK VII.

The Colonies and India.

CHAPTER XXIII.

THE COLONIES.[1]

British Empire.—The United Kingdom and all British Possessions, which go under the name of "His Majesty's Dominions" together with the "Indian States," "Protectorates," "Protected States" and "Mandated Territories" make up the British Empire. Thus it includes not only British territories but also foreign countries, in which the Crown of England exercises varying degrees of control. Sovereignty of the Imperial Parliament, supremacy of law, the supreme executive authority of the Crown, the irresponsibility of the sovereign, individual responsibility of Ministers and public servants, absence of *droit administratif* and other fundamental constitutional principles apply equally throughout the British Empire.

United Kingdom.—It means Great Britain and Ireland (now, *minus* the Irish Free State).

British Islands.—Include the United Kingdom, Channel Islands and the Isle of Man.[2]

British Possession.—It is defined as any part of His Majesty's dominions exclusive of the United Kingdom.[3]

1. See *Hal.*, Vol. X, para. 856 *et seq*; Anson, Vol. II, Pt. II, Sec. III; British Empire. Vol. III (By Keith).
2. Interpretation Act of 1889, 52 and 53 Vic. c. 163, s. 18.
3. *Ibid.*

British India.—It means all territories within His Majesty's dominions administered under the control of the Governor-General of India; whereas **India** means British India together with the territories of Indian princes and chiefs under the Suzerainty of His Majesty.

Colony.—It means any part of His Majesty's dominions exclusive of the British Islands and British India.[4] The term does not indicate any particular form of Government; the form of Government or their relation with the Crown or the Imperial Parliament differs in different colonies.

Protectorate.[4A]—It is territory outside British dominions but over which Crown exercises full control over its foreign relations, possesses right of legislation by Order in Council, and in general, administers it like a Crown colony by virtue of the powers conferred by the Foreign Jurisdiction Act,[5] or 'otherwise vested in His Majesty.' The Act recites that 'by treaty, capitulation, grant, usage, sufferance and other lawful means Her Majesty the Queen has jurisdiction within divers foreign countries,' and then goes on to say that the 'Crown may hold, exercise, and enjoy any jurisdiction . . . . in the same and as ample a manner as if Her Majesty had acquired the jurisdiction by *conquest or cession of territory*.' Thus in protectorates the Crown exercises full sovereign authority although theoretically they are foreign countries.

Difference between a Colony and a Protectorate.[6]—Colony is a British territory whereas a Protectorate is

4. Interpretation Act of 1889 (52 and 53 Vic, c. 163, s. 18).

4A. *The Protectorates are*—Basutoland, Bachuanaland, Borneo (North), Gold Coast (Northern), Malaya States (Federated), Nigeria (Northern), Nayasaland, Pacific Islands, Perim, Rhodesia, Sarawak, Somaliland, Sudan, Swaziland, Uganda, Zanzibar.

5. 53 and 54 Vic, c. 37.

6. See Anson, Vol. II, Pt. II, p. 60.

not so. A man born in a colony would be a British subject but one born in a Protectorate would ordinarily be an alien. Again, in a Protectorate by reason of the Foreign Jurisdiction Act, the Crown can always exercise control over legislation and administration, but not so in the case of *all* colonies.

Protected States.[7]—These are different from Protectorates of the colonial type. In the Protected States, the Crown does not exercise full sovereign authority as in Protectorates, but under treaty arrangements with those States exercises certain duties and powers only in regard to their external affairs and in some cases internal affairs also. There are a number of such Protected States in Borneo and the Malaya Peninsula.

Mandated Territories.[8]—These have mostly come into existence after the late German war. They are territories formerly in possession of Germany or Turkey. Great Britain is entrusted with certain rights and duties in regard to these territories by the League of Nations and has to act according to mandates of the League. In some of the mandated territories, full power is given of administration and legislation, as an integral part of the territory of the mandatory; in others, as in territories under Turkish rule, power is given only to give administrative advice and assistance till they can stand on their own legs; and in others again, as in certain Central and S. W. African territories, power is given to administer them under the laws of the mandatory, subject to certain safeguards, *e.g.*, freedom of religion, maintenance of public order, prevention of slavery, etc. The Mandatory

7. See British Empire, Vol III (by Keith), Ch. VII.

8. *The Mandated Territories are*—Palestine, Iraq (Mesopotamia), Tanganyika, New Guinea, Samoa, Central and South-West Africa.

has to furnish annually reports of the administration to the League of Nations.

Dominions.—Dominions are colonies possessing elective legislatures and *responsible government, i.e.*, government in which the executive are responsible to the elective legislature and not to the Crown acting through the colonial secretary and the Governor or the Governor-General. Colonies which now possess dominion status, *i.e.*, which are self-governing colonies possessing responsible government and which are, since the Imperial Conference of 1926, declared to be sovereign States fully independent of Great Britain, are the Dominions of Canada, the Australian Commonwealth,[9] Newfoundland, New Zealand. South African Union [10] and the Irish Free State.[10A] Malta and Rhodesia also now enjoy a large measure of responsible government.[11] The self-governing colonies received their constitutions mostly by Parliamentary Statutes and in some cases by Local statutes confirmed by Order in Council or by Letters Patent. Originally they were mere dependencies of Great Britain administered not for their own benefit, but for the convenience of the Mother Country. Their Legislatures were non-sovereign law-making bodies subordinate to the Imperial Parliament which enjoyed supreme legislative sovereignty over the whole British Empire including the self-governing Colonies. The Colonial Laws Validity Act [12] declared that " any Colonial law which is repugnant to the provisions of any Act of Parliament extending

9. Consists of New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia.

10. The Cape of Good Hope, Natal, the Transvaal and the Orange Free State.

10A. Ireland *minus* Ulster.

11. See British Empire, Vol. III (by Keith), p. 240 *et seq.*

12. 28 and 29 Vic. c. 63 (1865).

to the Colony . . . . shall to the extent of such repugnancy remain absolutely void and inoperative.'' The position and status of the Dominions have however undergone great changes not by any written constitution or by Parliamentary statutes but through practice, conventions, and understandings. The history of the development of the status of the self-governing Dominions, affords yet another notable example of contrast between theory and practice in the English constitution. For a long time the Dominions had come to be regarded as fully autonomous in regard to all *internal* affairs and since the late war, the practice had grown up of treating them as sister nations also in regard to *foreign* affairs. Thus in the treaty of Versailles the Dominions were not only consulted but were actual signatories to the treaty. Even the name '' British Empire '' was changed into '' the British Commonwealth of Nations.'' In spite of the growth of these tendencies, in theory the Dominions continued to be regarded as non-sovereign States subordinate to British Parliament not having the *full* status of individual units of international law until the great Imperial Conference of Premiers was held in 1926, presided over by Lord Balfour. The Conference without laying down any written constitution as in the case of the United States or other Federal countries, declared amongst other things, that henceforth (*i*) the Dominions are to be regarded as free nations or autonomous communities within the British Empire equal in status and in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and *freely* associated as members of the British Commonwealth of Nations; (*ii*) that they are to be regarded as sovereign States, free to act on their own responsibility within their own spheres; (*iii*) that they

may negotiate and conclude treaties with foreign countries, such treaties to be signed direct by their own representatives in the name of the King; (*iv*) that the King to act on the direct advice of the Dominion and not on the recommendation of the British Government; (*v*) that the Governor-General of the Dominion is to cease to be the agent of the Government of Great Britain and the formal official channel of communication between the two Governments but to occupy the same position in relation to the administration of public affairs in the Dominion as is held by the King in Great Britain; (*vi*) that all official communications between the two Governments are to be direct and without reference to the Governor-General; (*vii*) that the Dominions are to be at liberty to appoint Ministers or Ambassadors in foreign States; (*viii*) that the King is to be regarded as a symbol of the relationships between different parts of the Empire; (*ix*) that necessary changes in the title of the King and in existing administrative, legislative and judicial forms be made to give effect to the above declarations. Thus the contrast between the *legal* position of the Dominions as dependencies of Great Britain and their *actual* position in accordance with conventions and understandings is of the very highest importance. The Governor of a self-governing Colony who is appointed by the Crown occupies the position of the constitutional sovereign of Great Britain. He convokes, prorogues and dissolves colonial parliament: exercises the prerogative of pardon; bills passed by the legislatures must receive his assent; he is the supreme executive representing the Crown, and so on. But there is this principal difference between self-governing colonies and crown colonies and other colonies, that in the former the ministers who carry on the administration although technically holding office at the pleasure of the Governor, are responsible to the

electorate while in a crown colony they are responsible to the Governor. The legislatures of the Dominions are mostly bicameral, *i.e.*, possessing two chambers, an Upper House or Senate, sometimes elected, sometimes nominated, and a Lower House which is always elected and corresponding to the House of Commons in England.

Crown Colonies.[14]—Crown colonies are those in which responsible government has not been granted and in which therefore, the executive is subordinate to the Crown, controlled by the Secretary of State for Colonies. With the exception of this feature which is common to all crown colonies, they differ widely in regard to their constitution and form of government. They are generally of four types ;[15] (*a*) Those without any Legislative Council : (*b*) Those with a wholly nominated Legislative Council : (*c*) Those with a Legislative Council some of whose members are elected : and (*d*) Those with representative assemblies but without responsible government.

Classification of Colonies.—Colonies may be classified in two ways : (A) According to the mode of acquisition, and (B) according to the form of government.

(A) *According to the mode of acquisition* :

(1) *By occupation* (*Settled Colonies*).—These are territories where as for instance in Australia, the British people have settled at a time when they were either uninhabited or had no civilised government. The settlers carry with them the common law of England and so much

14. *The Crown Colonies are*—Ashanti, Bahama Islands, Barbados, Bermudas, Ceylon, Cyprus, Falkland Islands, Fiji Islands, Gambia, Gibraltar, Gold Coast, Grenada, Guiana (British), Helena (St.), Honduras (St.), Hong-Kong, Jamaica, Kenaya, Lucia (St.), Leeward Islands, Malta, Mauritius, Nigeria, Seychelles Islands, Sierra Leone, Straits Settlements, Trinidad Tobago and Vincent (St.).

15. See Anson, Vol. II, Pt. II, sec. 2.

16. 50 and 51 Vic, c. 54.

of its statute law as was then in force and which may be applicable to them under their peculiar circumstances because the sovereignty of the Crown of England went with them and because there was no *lex loci* in such uninhabited tracts. The King in Council may, under the British Settlements Act of 1887, establish such laws and such courts as he may think fit but not where Representative Government has been granted. In settled and conquered colonies, the native population are generally permitted to be governed by their personal or customary laws in regard to matters of succession, marriage and the like.

(2) *By conquest* (*conquered colonies*).—By the common law prerogative of the crown, a conquered or a ceded country becomes part of His Majesty's dominions and the people cease to be aliens and become subjects of the British sovereign. By common law of England, the subject cannot acquire sovereignty in a foreign territory except on behalf of the Crown. So where British subjects acquire any territory either by settlement or conquest it becomes a dominion of the British Crown. It is thus that the territorial acquisitions of the East India Company in India became territories of the British Crown.[16A] The laws of a conquered country will continue until altered by the Crown in Council or Crown in Parliament, the former power being of course, subordinate to the latter. In the case of the *Mayor of Lyons*,[16B] Lord Brougham points out the difference between foreign settlements obtained

16A. *Cf.* The case of acquisition of Sarawak from the Sultan of Borneo by Sir James Brooke commonly known as 'Rajah Brooke'; since 1888 by an agreement with Rajah Brooke, Sarawak has become a British Protectorate; see British Empire, Vol. III (by Keith), p. 289.

16B. (1836) *Mayor of Lyons* v. *East India Co.* 1 M. I. App. Cary 175 (272). See also judgment of Rankin C. J. in *Girindra* v. *Birendra* 31 C. W. N. 593 (609).

in an *inhabited* country by conquest or by cession from another power, and those made by colonizing or peopling an uninhabited or barbarous country. In the former, the law of the country continues until the Crown or the Legislature changes it, while in the latter, the subjects of the Crown carry with them the laws of England, there being no *lex loci* in the new country. The Crown in Council however cannot make any laws which are contrary to the fundamental laws of the British constitution, as, *e.g.*, giving exemptions from the authority of Parliament or from the general laws of trade, or granting exclusive privileges to individuals, nor can it legislate after once representative government or power of legislation which includes taxation, has been granted to a local assembly unless it has been specially reserved. These were the important propositions of law laid down by Lord Mansfield in *Campbell* v. *Hall*.[17] The facts of the case are that after the conquest of Grenada from the French in 1762, representative legislature was granted by a Proclamation in 1763. Subsequent to that, in 1764, a duty upon exports from Grenada was imposed by letters patent under the Great Seal. The plaintiff brought an action against the Collector of Customs in the island of Grenada to recover money paid as duty upon exports on the ground that the duty had been illegally imposed. Judgment was given for the plaintiff and it was held that the power of legislation having once been delegated, the Crown could no longer exercise the power of levying taxes.

(3) *By Cession* (*Ceded Colonies*).—The same rules apply in the case of Ceded Colonies, subject to provisions of the treaty, as in the case of conquered colonies. As regards the rights of the inhabitants of acquired terri-

17. I Cowp. 204; 20 St. Tr. 239-254; and 1387; see Thomas's L. C., p. 69.

tories, the law is thus summarised by Lord Dunedin in the case of *Nayak Vajesingji and others* v. *The Secretary of State for India.*[17A] "When a territory is acquired by a sovereign State for the first time that is an Act of State. It matters not how the acquisition has been brought about—by conquest, cession or occupation. In all cases the result is the same. Any inhabitant of the territory can only make good in the municipal courts established by the new sovereign such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to these inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the High Contracting Parties." To the same effect is also the judgment in the Pogoland case of *Cook* v. *Sprigg* [17B] in which Lord Atkinson observes "any obligation assured under the treaty either to the sovereign or the individuals is not one which municipal courts are authorised to enforce."

(B) *According to the form of government* :

(1) *Crown colonies*, which again we have seen, may be of four different types.

(2) *Dominions* or self-governing colonies, possessing representative legislatures and responsible government.

Position of Colonial Governors and Governors General.—

(A) *Rights and duties.*—He is appointed by the Crown and in the case of Governor his powers are

17A. 51 I. A. 357.
17B. (1899) A. C. 572.

defined by Letters Patent and the manner in which the duties are to be discharged is set forth in a formal document known as the *Instructions*. He has a double duty to discharge, duty to the colony and duty to the Crown and at times there arises a conflict between Imperial interests and interests of the colony when the position of the Governor calls for exercise of great prudence and caution. The position and powers of the Governor-General of a Dominion and those of the Governors of a Crown colony are vastly different; in the former case the Governor-General occupies the position of a constitutional monarch. As a result of the Imperial Conference of 1926, it has been declared that the Governor General of a Dominion is to hold in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by the King in Great Britain, and he is not a representative or agent of the Government of Great Britain. Thus in regard to actual administration he is to hold the same isolated position as is occupied by the King in England. But he will not become a mere figure-head for as in England in times of constitutional deadlock, it will be for him to decide whether Ministers shall resign or there is to be an appeal to the country and so on. While in the latter he has absolute discretion within the limits of his delegated authority. Barring this important difference, a Colonial Governor is the executive, legislative and military head of the colony; convokes, prorogues and dissolves legislative assemblies; the bills come before him for assent, veto, or reservation; appoints and dismisses public servants; exercises the prerogative of mercy; and is responsible only to the Crown. But as in England convention has grown up that the prerogatives of the Crown are exercised according to the wishes of the ministers; in the Dominions too the

correct procedure would be for the Governor or the Governor-General to accept the advice of the Prime Minister as regards dissolution, etc., of Parliament and not to act contrary to such advice.

(B) *Liabilities.*—The liabilities of Colonial Governors, etc., have been more or less discussed elsewhere.[18] Liabilities of Governors may be classified as *civil* liability and *criminal* liability. Civil liability may be incurred in official capacity or private capacity. In regard to *civil liability incurred in official capacity,* it is now settled that barring statutory exemptions and barring the case of the Lord Lieutenant of Ireland and the Governor-General of India,[19] Colonial Governors are liable to be sued both in England [19A] and in the courts of their respective colonies [19B] for wrongful acts done during their term of office. The *dictum* of Lord Mansfield in *Mostyn* v. *Fabrigas* [20] that a colonial Governor is in the nature of a Viceroy and therefore no proceeding civil or criminal, can be instituted in the colony during the term of his office has been dissented from in the later cases of *Hill* v. *Bigge* [21] and *Musgrave* v. *Pulido* [22] in which it has been held that his position is not that of a Viceroy but that his authority is derived from and is strictly limited by the commission, and therefore he cannot claim the general irresponsibility of the sovereign. A Colonial Governor therefore enjoys immunity only in regard to acts done within the limits of his commission as he would then be acting as servant of the Crown and

18. See *ante*, Ch. V, p. 113 and Ch. XII.
19. *Ibid.*
19A. *Mostyn* v. *Fabrigas*, Cowp. 161.
19B. *Hill* v. *Bigge*, 5 Moo. P. C. C. 465; *Musgrave* v. *Pulido*, 5 App Cas. 102.
20. (1774) Cowp. 161; 1 Smith's L. C. 591.
21. (1841) 3 Moo. P. C. C. 465.
22. (1880) 5 App. Cas. 102.

exercising its sovereign authority. But in regard to acts outside the scope of his authority they "cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state."[23] In *Mostyn* v. *Fabrigas* the plaintiff, a native of the island of Minorca of which the defendant was Governor was imprisoned and banished without trial whereupon he brought an action in England. It was argued before the King's Bench that no action would lie in England for an act committed in Minorca upon a native of that island. It was held such an action would lie, Lord Mansfield observing "It is impossible there could ever exist a doubt but that a subject born in Minorca has a good a right to appeal to the King's Courts of Justice as one who is born within the sound of the Bow Bell."[24] It was further held in this case as also in *Cameron* v. *Kyte*[25] both of which were referred to in *Musgrave* v. *Pulido*[26] that illegal acts of governors outside the scope of their authority cannot be regarded as acts of state. A governor however may escape the liabilities of an illegal act done in his official capacity if he can get an Act of Indemnity passed by the Colonial Legislature as was held in the case of *Phillips* v. *Eyre*.[27] That was an action brought in England against the defendant who was Governor of Jamaica for assault and imprisonment at a time when martial law had been proclaimed followed by an Act of Indemnity passed by the Jamaica Legislature to which the defendant as governor gave his assent. It was argued on behalf of the plaintiff that an Act of the

23. *Ibid* at p. 111; see *ante*, p. 162.
24. See Thomas's L. C., p. 87.
25. 3 Knapp 332.
26. (1879) 5 App. Cas. 102, at p. 111.
27. (1867) L. R. 4 Q. B. 225 and 6 Q.B. 1; 10 B. and S. 1004.

Colonial Legislature (*viz.*, the Act of Indemnity) could not bar plaintiff's right of action in England. It was held (1) that where a Colonial Legislature with plenary powers had been established, Acts passed by such Legislature must be treated in accordance with the principles of the comity of nations; and (2) that the Governor of a colony can legally give his consent to a Bill in which he is personally interested.

As regards *liabilities incurred* in the colony or elsewhere in *his private capacity*, a Governor may be sued in the courts of the colony as was held in *Hill* v. *Bigge*,[28] in the absence, of course, of any statutory immunities. As regards *criminal liability*, it is expressly provided for by statutes,[29] under which governors of colonies and other public officers committing crimes in places beyond seas may be tried in the Court of King's Bench.

Colonial Legislation.—

(A) *Dominions.*—The Parliaments of the Dominions are representative legislatures possessing under the authority of the Imperial Parliament,[30] *constituent powers, i.e.*, powers to change their own articles of constitution without of course affecting the supremacy of the British Parliament. Thus although within their spheres they have sovereign legislative powers, they are really non-sovereign legislative bodies being subordinate to the Imperial Parliament. Under the Validity of the Colonial Laws Act of 1865,[31] any laws passed by Colonial Legislatures repugnant to any Act, or order or regulation

28. 3 Moo. P. C. C. 465.

29. 11 and 12 Will. III, c. 12 and 42 Geo. III, c. 85; see also Government of India Act of 1919, sec. 127 (9 and 10 Geo. V. c. 101); see *R.* v. *Wall*, 28 St. Tr. 51; *R.* v. *Picton*, 30 St. Tr. 225; see Thomas's L. C., p. 92 (note).

30. 28 and 29 Vic., c. 63, s. 5.

31. *Ibid*, sec. 2.

under such Act of Parliament, extending to the Colony, will be void and inoperative to the extent of such repugnancy. Courts can declare such laws as *ultra vires*. With regard to the bills passed, the Governor may refuse his assent, or reserve the bill for the consideration of the Crown in which case it does not come into force until it has received royal assent, or, the Crown in Council may disallow the Act within two years. These powers however can now no longer be exercised, the Dominions enjoying absolute autonomy in regard to all internal and external affairs. By the Conference of 1926 the Dominions have for all practical purposes, been declared to be sovereign States in no way subordinate to Great Britain or the British Parliament. The existing statutory provisions requiring the reservation of Dominion legislation for the assent of His Majesty or authorising the disallowance of such legislation and the provisions of the Colonial Laws Validity Act of 1865 will have to be altered and Dominion legislatures must also be given the power of granting extra-territorial operation to their legislation consistently with the independent status accorded to the Dominions by the Conference. The Dominion legislatures not only legislate but as in England, control the administration, the executive being responsible to the representative legislature. There is the same cabinet system of Government, Upper and Lower Houses of Parliament, money bills originating in the Lower House (but only on the recommendation of the Governor-General), and so on. They can legislate for the peace, order and good government of the colonies; establish or abolish Courts of Judicature. Extra-territorial legislation, however, is not, as a rule, allowed and may be declared *ultra vires*. Thus, New South Wales, passed a law punishing bigamy wherever committed with penal servitude, and in the case of *Macleod*

v. *Attorney-General for New South Wales*,[32] the appellant having committed bigamy in the United States, the Privy Council held the Act so far as it affected bigamy outside the territorial limits of the colony as *ultra vires*. There have been cases, however, where the Privy Council have held that a Colonial Act may have extra-territorial force and would not be *ultra vires*.[33]

(B) *Crown Colonies*.—In *Conquered* and *Ceded Colonies*, although the Crown by virtue of Royal prerogative enjoys the sole right of legislation, except so far as restricted by the articles of capitulation or treaty, a right which is exercised either through a Governor or by orders in Council, the laws of the conquered or ceded colony, if there be any, continue, if they are not contrary to the principles of justice, and humanity, until new laws are introduced by the conqueror. In the absence of any local laws they would continue to be governed by principles of justice, equity and good conscience, till the introduction of laws by the crown. In *settled colony*, we have seen, the rule is different. The Crown in Council possesses right of legislation under statutory authority, *viz*., the British Settlements Act of 1887, the settlers carrying with them British common law and so much of statute law as was then in force and applicable to the circumstances of the new country. In all Crown Colonies, however, conquered, ceded or settled, the power of the Crown to legislate ceases as soon as representative institutions have been granted, but the Crown's prerogative of veto remains unaffected. Again, all colonies including self-governing Dominions are subject to the

32. (1891) A. C. 455.

33. See *P. and O. Company* v. *Kingston*, (1905) A. C. 471; Att.-Gen. for *Canada* v. *Cain*, (1906) A. C. 542. But see *ante* for the result of the Imperial Conference of 1926 *re* extra-territorial operation of Dominion laws.

legislative sovereignty of the Imperial Parliament but no Imperial Statute binds a colony unless it is so expressly stated there. As examples of the exercise of the sovereign authority of the Imperial Parliament suspension of the Canadian Constitution on two occasions,[33A] and the abolition of slavery throughout the British Empire in 1834 [33B] may be cited.[33C]

Colonial Judiciary.—Courts have been established in different ways according as the colonies possess representative institutions or not.[34]

(1) In colonies which have received representative institutions, *i.e.*, in self-governing colonies, courts are established by Colonial Legislatures empowered by Imperial statute to establish and alter constitution of Courts of judicature and make provision for the administration of justice. The judges of the Superior Courts are appointed by the Governor (or Governor-General) in Council, hold office during good behaviour and are removable on an address from both Houses to the Governor-General.

(2) In colonies to which representative government has not been granted, Courts are established by the Crown either under Prerogative as in Conquered and Ceded Colonies or under statutory power such as under the British Settlements Act of 1887 (50 and 51 Vic., c. 54), as in settled colonies. The Judges are appointed by Letters Patent under the Royal Sign Manual. The Judges hold office during good behaviour, are removable by the Governor in Council, the order of dismissal being subject to appeal to the Judicial Committee.

33A. 1 and 2 Vic., c. 9; and 2 and 3 Vic., c. 53.
33B. 3 and 4 Will. IV, c. 73.
33C. See Ridges, Cons. Law, p. 455.
34. See Hal, Vol. X, para. 943, *et seq.*

(3) In **India**, the power of establishing or altering constitution of courts seems to be the same as in self-governing colonies. In the case of *Parmeswar Ahir* v. *The Emperor* [34A] it was held on a " proper construction of the India Councils Act of 1861 and in the light of previous enactments and the powers consistently exercised thereunder " that the Indian legislature has power to establish new courts.

As regards *appeals from the colonies* formerly they lay to the Crown in Council and were heard by the Star Chamber and now by the Judicial Committee of the Privy Council. The right of appeal to the Privy Council is regulated by Orders in Council and by laws passed by local legislatures subject to such Orders in Council.[35] The Crown, however, has the prerogative right to *grant special leave* unless the prerogative has been parted with in *express terms*. In *criminal cases* the Judicial Committee do not as a rule grant special leave except under exceptional circumstances of gross miscarriage of justice or unless the question raised is one of grave importance.

Lord Haldane in the recent case of *Begu and others* v. *King Emperor* [36] observes : " This tribunal is not a court of Criminal Appeal. When there has been evidence before the court below and the court below has come to a conclusion upon that evidence, their lordships will not disturb that conclusion ; they will only interfere in such circumstances as are referred to in the well-known case of *Dillet In re*,[37] where there has been a gross miscarriage of justice or a gross abuse of the forms of legal process."

34A. 3 Pat. L. J. 537 (F.B.)
35. *Cf.* sections 109 to 112 of the Civil P. Code (Act V of 1908).
36. 49 Bom. 451.
37 (1887) 12 A. C. 459; 16 Cox, c. c. 241.

CHAPTER XXIV.

INDIA.

British connection with India.—Sir Courtney Ilbert divides British connection with India into *four* periods. *First* period, from 1600-1765; *Second* period, from 1765-1858; *Third* period, from 1858-1917; and, the *Fourth* period, from 1917 down to the present time. We will follow this classification to trace the gradual development of the Indian Constitution under British rule through these successive periods. "Constitutional history in this country," says Mr. Cowell, "has nothing to do with the steady spontaneous growth of national institutions. It is a record of experiments made by foreign rulers to govern alien races in a strange land, to adapt European institutions to oriental habits of life, and to make definite laws supreme amongst peoples who had always associated government with arbitrary and uncontrolled authority.[1] There is considerable vacillation of purpose exhibited in these experiments, influenced as they were by conflicts of opinion and the rivalry of interests, but on the whole there was a steady advance towards securing impartial justice and legislation."[2] These words were said in 1872 and are eloquent as showing how with the progress of time, ideas change. Impartial legislation and justice when coming from the hands of alien rulers no longer satisfy the people. They want representative institutions which will enable them to make their own laws and place administration in their

1. This is not true of India during Hindu administration.
2. Cowell's T. L. L. (1872), p. 3.

own hands. "The Act of 1861," said His Majesty the King Emperor, "sowed the seed of representative institutions and the seed was quickened into life by the Act of 1909."[3] But after all, it was a poor and sickly plant, for the Morley-Minto Act of 1909 though making some advance, gave no responsible legislature, much less responsible executive. The spirit of nationality roused and fostered in the people, no less by the influence, teachings and traditions of the great nation with which Providence had brought India into such close contact, than by the great world-forces effecting fundamental changes in men's ideas, would not be satisfied with such pitiful doles. Then came the great German war in which the selfless devotion and sacrifice shown by the Indian people—Princes and Peasants alike—completely changed the angle of vision of the rulers. They felt that the form of government hitherto adopted in India was "too wooden, too antediluvian." The result was the famous declaration of Mr. Montagu, Secretary of State for India, before the House of Commons on the 20th of August, 1917 which two years later, formed the basis of the Government of India Act of 1919. The preamble to the Act, amongst other things, says "Whereas it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian administration and for the gradual development of self-governing institutions, *with a view to the progressive realization of responsible Government in British India as an integral part of the Empire;* etc." Thus the Act of 1919 is but a preliminary step towards self-government. It has failed to satisfy the growing aspirations of the people. To-day, India wants to rule herself; wants *Swarâj* or Home Rule

3. In the Royal Proclamation of Dec. 23rd, 1919, on the occasion of giving assent to the Reform Bill.

such as is enjoyed by the Self-governing Dominions, to become an honoured partner in the British Empire, instead of being a subject country under alien rule; bound, no doubt, by the silken ties of loyalty and affection to the Royal House in England, but, capable of shaping its own destinies. This is the goal of the Indian Constitution which India aspires to reach and which, in effect, was what was declared in the preamble to the Government of India Act of 1919, and so nobly expressed in His Majesty the King-Emperor's message on the opening of the Indian Legislation in 1921—"For years, it may be, for generations, patriotic and loyal Indians have dreamed of *Swarâj* for their Motherland. To-day you have the beginnings of *Swarâj* within my Empire." The goal when reached will mean the shifting of the sovereignty from the British Parliament to the people of India.

How the British acquired sovereignty in India.—Sir John Seeley observes: "We seem, as it were to have conquered and peopled half the world in a fit of absence of mind." The observation does not apply to India; for neither did the British acquire sovereignty in India, at any rate, in Bengal, by conquest, nor did they people it, although there might have been some degree of absent-mindedness in their acquisition of sovereignty. The British acquired sovereignty in India through the East India Company. Now, the East India Company, when it came out to this country for the purposes of trade, had not the slightest idea of conquest or territorial acquisition.[3A] By force of circumstances the Company found itself one day clothed with the virtual powers of sovereignty; the British nation was hardly aware at the time that a Company of merchants were

3A. The early Charters show this.

exercising sovereign powers over vast territories in India. How or when the Company acquired sovereignty cannot be said with exact precision. " At what precise time," says Lord Brougham, " and by what steps, they exchanged the character of subject for that of sovereign, or rather acquired by themselves, or with the help of the Crown, and for the Crown, the rights of sovereignty cannot be ascertained."[4] Even in the Charter of 1753 (26 Geo. II) re-establishing Mayors' Courts at Madras, Bombay, and Calcutta, Indians were excluded in Civil suits, unless submitting by consent, from the jurisdiction of these Courts, a fact which, says Cowell, "appears to involve a renunciation (*sic*) of sovereign authority at that time over Natives."[5] It was not till 1813 that we find ' sovereignty ' expressly recognized by Parliament in Statute 53 Geo. III, c. 155, S. 95, where it is spoken of as ' undoubted,' and as residing in the Crown.[5A] As a matter of fact however, sovereign powers were exercised by the East India Company from 1765, the date of the grant of the *Dewanny* by Emperor Shah Alum to the said Company, and to a certain extent even from before.

(A) First Period (1600-1765).—This is usually known as the *Commercial period* of the East India Company, although as a matter of fact, by the middle of the 18th century the Company had made great acquisitions of territory. During this period the powers of the Company, of the Crown of England, and of the Mogul Emperor or other Indian Rulers, over the territories which came to be in possession of the East India Company by conquest or otherwise were vague and undefined. The

4. *Mayor of Lyons* v. *East India Co.*, 1 M.I. App., Cases 175 (275).

5. Cowell, p. 21.

5A. See the *Advocate General of Bengal* v. *Ranee Surnomoyi*, 9 M.I.A., 387 (397).

first period extended from the grant of the Charter by Queen Elizabeth to a Company of London merchants, to the acquisition by the Company of the *Dewanny* or Fiscal administration of Bengal, Behar, and Orissa from the Mogul Emperor Shah Alum. Queen Elizabeth's Charter granted for a term of 15 years, conferred on the Company the monopoly of trade in the East Indies, from the Cape of Good Hope to the Straits of Magellan, and granted certain legislative and executive powers for the good government of the Company and for maintaining discipline amongst its servants. Though the monopoly of trade was renewed in subsequent reigns, private individuals began to trade with the East Indies. In the case of the *East India Co.* v. *Sandys*,[6] the King's Bench in 1684, decided the question of monopoly in favour of the Company. Ten years later however, when a ship called the *Redbridge*, lying on the Thames, ready to sail for trade to the East Indies, was detained by order of the Court of Directors, the question of monopoly was reagitated, and a resolution was passed by the House of Commons to the effect that all British subjects had equal rights to trade in the East Indies unless prohibited by Acts of Parliament. In 1698, another Company was incorporated under the authority of an Act of Parliament, and it was not till 1708 that the two Companies were amalgamated and came to be called subsequently the *East India Company*. During this period, besides its struggles with interlopers and the new rival Company, the East India Company had also to contend for supremacy with the Dutch and the French, and, towards the close of this period, with the Nabwab of Bengal, agent of the Mogul Emperor at Murshidabad. The downfall of the Mogul Empire after the death of Aurangzeb in

6. (1684) 10 St. Tr. 371; see *ante*, Ch. XI, p. 199.

1707, the feuds between the Mahrattas and the Mahomedans and the rivalry with the French were the main causes that ultimately forced the East India Company to adopt an aggressive policy, acquire territorial possessions and consolidate their position in such possessions. With the victory over the French in 1750, Madras became the most important settlement under the East India Company. In Bengal, the battle of Plassey and victory over Seraj-ud-Dowla, followed eight years later, by the grant of the *Dewanny* in 1765, established the *virtual* sovereignty of the Company over the three Provinces. In other parts of India also, the Company acquired territories either by conquest, cession or otherwise. Between 1708, when in the reign of Queen Anne, the two Companies were amalgamated under the award of Lord Godolphin, and the passing of the Regulating Act in 1773, *i.e.*, within 65 years, the Company had acquired large territories in India.[7] Over all these territories howsoever acquired, the East India Company from the moment of their acquisition, exercised all the essentials of sovereignty. As observed by Perry J., acquisition of a vast kingdom by a corporation of merchants was a new fact in the history of the world, but how far the *defacto* power could be supported by authority *de jure* could not be very clearly ascertained.[8] The Company was naturally reluctant to apply to the Crown of England for authority and aid, as that would have interfered with its own powers and its income. At one time, towards the commencement of the reign of George III, *i.e.*, about 1760, the East India Company set up a claim to the sovereignty over the territories in its possession in India, as against the Crown of England, a claim

7. See Cowell, p. 8.

8. See *Regina* v. *Shaik Boodin* (1846) Perry's Oriental Cases, 434 (461).

which was at once knocked on the head on the ground that under English common law all acquisitions of territories by subjects belong to the Crown. In consequence, however, of the claim so set up by the Company, an agreement was entered into between the Company and the public in England that the territorial acquisitions and revenues lately acquired in the East Indies should remain in the possession of the Company during the term mentioned therein. The agreement was given effect to and the period extended from time to time by subsequent statutes, but it was not till the Statute of 1813,[8A] that we find it expressly stated in the preamble to that statute, that the Company were to remain in possession and government of the territories acquired by it in India without prejudice to the " undoubted " sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the same.[3B]

Position of the East India Company in the " early " Settlements and Factories.—At first, and until sovereignty was acquired, the position of the British and of the East India Company was that of subjects owing allegiance to the native ruler. Speaking of Calcutta, and the same observations would apply as well to other Factories at this period, Lord Brougham observes " Calcutta [9] was founded and the Factory fortified in a district purchased from the owners of the soil by permission of that Government, and held under it by the Company as subjects owing obedience, as tenants rendering rent, and even as officers exercising, by delegation, a part of its administrative authority."[10]

8A. 53 Geo. III, c. 155, S. 95.

8B. See *Gibson* v. *The East India Co.*, (1839) 5 Bing. N.C. 262.

9. In 1698, the Nawab of Bengal gave permission to the Company to purchase the villages of Sutanati, Govindpur and Calcutta.

10. *Mayor of Lyons* v. *E. I. Comp.* (1836) 1 M.I. App. Cases 173 (273).

The position was wholly different, as pointed out in several decided cases,[11] from settlement acquired by conquest or cession from another power in an inhabited country or from settlements in uninhabited or barbarous countries established by British colonists. The Crown of England having no sovereign rights in such Factories and Settlements, could not delegate such rights to be exercised by the Company. The position of the British and of the East India Company at this period was extremely anomalous. The Factories were parts of the Mogul Empire but instead of Mahomedan law being administered, the English law was administered within them as if these Factories and Settlements were in an English territory. This, of course, was possible by reason of the acquiescence, negligence or remissness of the native rulers. Therefore it became necessary to obtain authority from the Crown of England to exercise judicial, executive and legislative powers over the servants of the Company and Europeans voluntarily residing within these Factories. The early Charters granted by the English sovereigns conferred on the East India Company such powers. So were in effect, the Charters of Queen Elizabeth (1966), of James I (1609), of Charles II (1661), of William III (1698), of George I (1726), of George II (1753), besides several others. The jurisdiction conferred by these Charters was therefore *personal*, *i.e.*, applying only to the servants of the Company and Europeans living within these Factories, and did not extend over Indians living within these Factories unless they voluntarily submitted to such jurisdiction, or the natural jurisidiction of the native rulers over them

11. *Ibid*; see also observations of Lord Kingsdown in *Advocate General of Bengal* v. *Ranee Surnomoyi*, 9 M.I.A., 387 (424), and of Sir George Rankin C.J. in *Girindra* v. *Birendra*, 31 C.W.N. 593 (608-609); see also *ante*. Ch. XXIII, "Classification of Colonies."

was avoided by other means. When the Nawab was about to send a Kaji, or Judge, to administer justice to the Indians within these Factories, the Company's servants would bribe him to abstain from so doing.[12] The Bombay Charter of 1669 granted by King Charles II was an exception, conferring *territorial* jurisdiction over *all* persons within the island of Bombay, the reason being that the island of Bombay was granted to the East India Company in perpetuity by King Charles II who had obtained it from the King of Portugal as part of the marriage dowry of the Infanta.

What law was administered in these early Settlements and Factories.—The Factories of the East India Company were established and fortified, in territories over which the Mogul Emperor was the sovereign. If these settlements had been in the western parts of the world, the settlers would have been incorporated into the general body of the people and would have been governed by the law of the country where they had settled. But it was not possible in the East: the British Settlers in India could not be governed by Mahomedan law. "In the East," as observed by Sir William Scott, afterwards Lord Stowell, "from the oldest times an immiscible character has been taken up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were."[13] What law was administered within these Factories during this period has been discussed and answered by the Judicial Committee in the above case of the *Indian Chief* [14] and in the cases of the *Mayor of Lyons* v. *The East India*

12. See *Mayor of Lyons* v. *East India Co.*, 1 M.I., App. Ca. 272.
13. (1801, *The Indian Chief*, 3 Rob., Adm. Rep., 12 (28).
14. *Ibid.*

Co.[15] and the *Advocate General of Bengal* v. *Rani Surnomoyi*[16] and summarized by Sir George Rankin C. J., in the recent case of *Girindra* v. *Birendra*.[17] When in 1726 Mayors' Courts were established in the Factories at Calcutta, Madras and Bombay, English Statute law as it existed prior to 1726, and English common law were applied, as far as circumstances of the country permitted, not merely to Europeans but all persons including Indians living within these Factories which later on, became the limits of the Original Jurisdiction of the High Courts in the three Presidency towns. English law, Civil and Criminal, was introduced not by virtue of the sovereignty of the British Crown which did not then exist, but by acquiescence or sanction and permission of the native rulers. "The position was," says Rankin C. J., "that there being a factory of the English in a territory which had a sovereign of its own, that sovereign permitted the introduction of English law within the limits of the factory and that introduction in the end extended not merely to Europeans themselves but to those who associated themselves with Europeans and became part of the inhabitants of that place." It should however be remembered that it was not the *entire* English law that then existed that was introduced, but only so far and so much as the circumstances of the country required or permitted. Thus in the case of the *Mayor of Lyons* it was held that the English law incapacitating aliens from holding real estate to their own use, and transmitting it by descent or devise, or the Statute of Mortmain[17A] was not introduced. So again

15. (1836) 1 M.P.C.C., 175.
16. (1863) 9 M.I.A., 387.
17. (1927) 31 C.W.N., 593 (608-609).
17A. See *ante*, Ch. XIII, p. 253.

in the case of the *Advocate General* v. *Rani Surnomayi*, it was held that the English law of *felo de se*, and forfeiture of goods and chattels was not part of the English law, Civil and Criminal, which had been introduced into these Factories. The Charter of Charles II in 1661 was the first and indeed the only one which in express terms introduced English law into the East Indies. It gave authority to the Company to appoint Governors of the several places where they had Factories and authorized such Governors and their Council to judge all persons belonging to the said Company or that should live under them, in all causes, whether Civil or Criminal, according to the laws of the Kingdom of England, and to execute judgment accordingly. But at that time as the English Crown had no jurisdiction over the native subjects of the Mogul Emperor, the Charter was evidently intended to apply only to the European servants of the Company. "The English law, Civil and Criminal, has been usually considered to have been made applicable to the Natives as well within the limits of these Factories from the year 1726, the date of the Charter, 13 Geo. I." [18]

The distinction between the Presidency Towns and the Mofussil which originated in the distinction between the Company's Factories and the Mogul territory has been perpetuated as a result of two later Parliamentary Statutes, *viz.*, the Regulating Act of 1773 and the Declaratory Act of 1781.[18A] English law had never been introduced into the Mofussil where the Company's Courts administered justice according to the Regulations passed by the Governor-General in Council for Bengal and by the Governors-in-Council for the Presidencies of Madras

18. *Per* Lord Kingsdown in the *Adv. Gen. of Bengal* v. *Rani Surnamoyi*, 9 M.I.A., 387 (426).
18A. See Cowell, p. 79.

and Bombay. The introduction of English Common law and of Statute law as it existed prior to 1726 within these Factories which became Presidency Towns in later times, has given rise to anomalies which are felt to a certain extent even to this day. Thus for example, slander of women is not actionable within the three Presidency Towns without proof of special damage, although outside such limits, such suits would be maintainable without such proof.[18B] It is high time that such anomalies were removed and the same law made applicable both for the Presidency Towns and for the Moffusil.

Judicial, Executive and Legislative powers of the Company during the first period.—The early Charters, as we have seen, granted to the Company, *i.e.*, its Governors and Councils, powers to make laws, establish courts within its Factories and Settlements and administer justice, in order to maintain discipline amongst its servants and to protect their interests and those of the Company as a Corporation of merchants. The powers, judicial, executive and legislative, of the Company at this period, extended only over its own servants, over Europeans living within these Factories, and to some extent also over Indians living there, but did not extend over the people at large, *i.e.*, Indians or even Europeans outside the limits of the Factories.

Of the early Charters establishing Courts in the Factories of the Company, the most important was the Charter of 1726 (13 Geo. I) by which *Mayors' Courts* were established at the Factories at Madras, Bombay and Calcutta. The Charter recited that as those places had become very populous where not only Europeans but

18B. See *ante*, Ch. VII, p. 158.

also Indians flocked for trade or residence, there was great need for a proper machinery for speedy and effectual administration of justice in civil and criminal matters. With this object, the existing courts, whatever they were, were abolished and Mayors' Courts established in their place, consisting of a Mayor and nine Aldermen, seven of whom were to be British subjects, for the trial of *civil* suits. They were made Courts of Record. Appeal from the decisions of the Mayor's Court lay to the Governor and Council which was also constituted a Court of Record, and in cases above 1,000 *pagodas* in value, a further appeal lay to the King in Council, *i.e.*, to the Privy Council. As regards *criminal* cases, the Charter declared that they were to be conducted as far as possible as cases tried in England before Justices of the Peace or Commissioners of Oyer and Terminer. The Governor and Council were constituted Justices of the Peace and a Court of Oyer and Terminer and required to hold quarter Sessions for the trial of all offences excepting high treason. This Charter was superseded in 1753 by the Charter of George II (26 Geo. II) which re-established Mayors' Courts at Madras, Bombay and Calcutta and also established *Courts of Requests* at those places for the determination of suits " where the debt, duty or matter in dispute did not exceed 5 *pagodas*." Both the Courts were made subject to the control of the Court of Directors; they were however, to have no jurisdiction in suits between Indians living within these towns, except on consent of the parties.[19] During this period, the supreme executive and legislative powers were vested in the Presidents or Governors and Council of *the three Presidencies who were wholly independent of one another* but subject to the control of the Court of Directors.

19. See Cowell, pp. 18-21.

As regards legislative powers of the Company at this period, there was not much need for their exercise, English law, as we have seen, being introduced into these Factories.

Period between the battle of Plassey and the grant of the Dewanny.—This was the period of the worst confusion and anarchy. By the middle of the 18th Century the Company had become a great military and political power in India and had got large territories in its possession over which it began to exercise sovereign powers without of course any legitimate claim, such powers not having been delegated either by the British Crown nor obtained from the Mogul Emperor. The victory over Seraj-ud-Dowla made the servants of the Company virtual masters of Bengal. The Company set up Nabwabs and dethroned them in quick succession, like so many puppets, on the *guddee* at Murshidabad, made them conclude treaties which amongst other conditions, included donations of large sums of money in cash, amounting to several crores of rupees to the Company and its servants. Practically freed from all control from England, the servants of the Company began to enrich themselves by loot and plunder and introduced a form of government which in the words of Macaulay,[20] "resembled the government of evil genii, rather than the government of human tyrants." The country groaned under the worst forms of " rapine, plunder and tyranny," and " the people found the little finger of the Company thicker than the loins of Seraj-ud-Dowla." Thus ended the first chapter of British connection with India.

(B) Second Period (1765-1858).—This is usually known as the *period of the Sovereignty of the East India*

20. Macaulay's Essays, Vol. III, p. 177, quoted in Cowell, p. 23.

Company. The second period extended from the grant of the Dewanny of the Provinces of Bengal, Bihar and Orissa in favour of the East India Company by a *Firman* dated the 12th of August, 1765, to the assumption of direct government of British India by the Crown of England and end of Company's rule. The grant of the Dewanny is generally regarded as the acquisition of sovereignty in India by the East India Company on behalf of the Crown of England. The earlier Charters, we have seen, conferred on the Company powers to carry on trade in the East Indies, but later on, when England saw that the Company had acquired sovereignty by the grant of the Dewanny and was in possession of large territories in India, Parliament by several statutes [21] beginning with the Statute 7, Geo. III, c. 57 (1767), delegated powers of sovereignty to the Company to be exercised on behalf of the Crown over these territories. Thus it was clear that the sovereignty acquired by the Company either by the grant of the Dewanny, or by conquest cession or other means, was acquired on behalf of the Crown of England and it was therefore necessary that the Crown should delegate powers of sovereighty to be exercised by the Company, distinct from their powers to carry on trade which had been conferred by the earlier Charters.

The Dewanny; and the period immediately succeeding it.—The *Firman*, amongst other things, recited : "As the said Company are obliged to keep up a large army for the protection of the Provinces of Bengal, etc., we have granted to them whatsoever may remain out of the revenues of the said Provinces, after remitting the sum of 26 *lakhs* of rupees to the royal Circar, and

21. *E.g.*, 53 Geo. III c. 155, s. 61 (1813); 3 and 4 Will. IV, c. 85 (1833) and others. See *post*.

providing for the expenses of the Nizamat." It transferred to the Company the collection of revenue and with it, the administration of *civil* justice. "It was a perpetual grant to the Company of the revenue when collected, subject to the payment of 26 *lakhs* to the Emperor,[22] and to defraying the expenses of the Nizamat." [23] The *Nizamat* or the control of the Police and administration of *criminal* justice was not transferred which was left in the hands of the Nabwab of Bengal who was *Nabwab-Nazim* or Deputy of the Emperor's Minister for criminal administration, to whom the Company had to pay about 54 *lakhs* per annum [24] for the Nizamat and other expenses. Strictly speaking, the grant of the Dewanny cannot be regarded as a transferance of the sovereignty from the Mogul to the British, but in effect it was *virtually* so. Clive was seeking for an opportunity to get some sort of legal right for the exercise of sovereign powers, and he now readily availed himself of the outstanding sovereignty of the Mogul Emperor, and obtained from him the grant of the Dewanny. It gave the Company at least a semblance of authority over the Indians, which together with actual possession of the country, and military power, was quite sufficient for purposes of government. Clive and, after him, Hastings at once began to exercise all kinds of sovereign functions, to carry on the work of

22. The payment to the Emperor was stopped in 1774.

23. Field's Introduction to the Bengal Regulations, p. 2.

24. The amount paid to the *Nabwab-Nazim* was gradually reduced more and more, until a final settlement of the Nizamat affairs was made by an Indenture dated the 12th of March, 1891, the indenture being embodied in the schedule to Act XV of 1891. It provides *inter alia* for the payment in perpetuity to the Nabwab Bahadur of Murshidabad and his heirs male of an allowance of 2 lakhs 30 thousand per annum. The title of Nabwab-Nazim ceased to exist since 1880, when the then Nabwab, Monsur Ali, abdicated all claims to the position and title. See Conquest of Bengal by Mr. Basanta Coomar Bose, Advocate, High Court.

organization and administration, to establish courts, civil and criminal, in the *moffusil* and in the *sudder*, enter into treaties with Indian Princes, annex native States, confiscate zamindaries (as many of the reports of the decisions of the Privy Council will show), and perform various other similar acts. Such acts were done by the Company either under the colour of authority derived from the Mogul, or as *defacto* masters of the country or under delegated powers from the Crown or Parliament of England. But for about 7 years from the establishment of the Supreme Court at Calcutta in 1774 to 1781 when the powers of that Court were limited, the attempts on the part of the Company to organize society and carry on the administration according to its scheme of organization, were very much disturbed by the attitude of the Supreme Court towards the Government of the Company. The Governor-General's Council also was often a house divided against itself, giving rise to frequent violent quarrels between the Governor-General and some members of his Council.

Dual character of the East India Company during the second period.—From what we have said already, it will be apparent that the Company came to possess during this period a *dual* character—that it was a Company of merchants trading to the East Indies, and also a Sovereign power. The first character it received from its early Charters, and the latter from the transference of sovereignty by the Mogul Emperor, and subsequently, from the later statutes delegating sovereign powers to the Company by the Crown in Parliament. Its acts during this period were therefore of wholly two different kinds, according as they were done in the exercise of its sovereign rights, or as done in its capacity as a corporate body of merchants. In *Gibson* v. *The East India Company*, Tindal C. J. accurately describes

the position in these words [24A]—" It is manifest that the East India Company have been invested with powers and privileges of a twofold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the Affairs of India), power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the Native powers of India." In the case of the *ex-Raja of Coorg* v. *E. I. Company*,[25] Sir John Romilly, Master of the Rolls, observes " acts done by the Defendants (the Company) are frequently of an ambiguous character, and it becomes extremely difficult to ascertain, whether any particular act is to be attributed to the exercise of the political power of a Sovereign State, or to the functions of a Company of merchants trading to the East Indies." The difficulty still continues even under the present Government of India Act of 1919, when there is no longer any East India Company and the Crown has through the Secretary of State for India, assumed direct government of the country, by reason of a provision in that Act, *viz.*, Section 32 (Cl. 2),[26] which declares that " every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company." We have already discussed [27] how the above provision in the Government of India Act has been interpreted by judicial decisions of a somewhat conflicting character, in regard to the right of action against the Secretary of

24A. 5 Bing. N. C. 273, quoted by Lord Kingsdown in the *Secretary of State for India in Council* v. *Kamachu* 7 M.I.A. 476 (530).

25. (1860) 20 Beavan 300 at p. 309; see *ante*, Ch. XII, p. 230.

26. It was Sec. 65 of the Government of India Act of 1858.

27. See *ante*, p. 149.

State for India in Council for acts of tort committed by Government servants in the discharge of public duties.

System of double government during the second period.—When the reports of the various acts of oppression and tyranny perpetrated by the servants of the East India Company specially during the years immediately preceding the grant of the Dewanny reached England, the people there naturally became very indignant. Statesmen like Burke and others stood up as champions in the House of Commons for the oppressed people of India, and Parliament resolved to control the affairs of the Company both at Home and in India. "The English Government," says Mr. Cowell, "appear by this time to have determined to interfere directly with the authority of the Company, and to assume the exercise of the sovereign powers which had been conceded by the Mogul." [28] With this object, Parliament in 1773, passed the East India Company Act, commonly known as the *Regulating Act* (13 Geo. III. c. 63) which was practically the first Parliamentary Statute dealing with the affairs of the East India Company; the main object of the Act was to make the Crown supreme in the administration of justice. This Act proved a great blunder and was followed in quick succession by a number of other Parliamentary statutes, as a result of which a system of *double government* was established in India, the responsibilities of government being shared between the Crown and the Company, the control of the Crown being gradually increased more and more until at last in 1858 Company's rule was put an end to.

The Regulating Act of 1773 (13 Geo. III. c. 63) and its effects.—Although the object of Lord North's

28. Cowell, p. 42.

Ministry in passing this Act was highly laudable, the immediate result of the Act was disastrous, owing mainly to the action of the Supreme Court which was established in Calcutta in 1774 by a Charter under this Act. By this Act a *Governor-General* and four Councillors were appointed for the Presidency of Fort William in Bengal in whom the whole civil and military Government of Bengal, Bihar and Orissa was vested; in case of difference, the opinion of the majority was to prevail; Presidents and Councils of Madras and Bombay were made subordinate to the Governor-General and Council of Bengal in regard to making wars and treaties; the Governor-General and Council were empowered to make rules, ordinances and regulations for the good order and civil government of the United Company's settlement at Fort William and other factories and places subordinate to it, such rules, regulations, etc., not being repugnant to the laws of the realm; but such laws, regulations, etc., were not to be valid until approved by, and duly registered in, the *Supreme Court* to be established by a Charter; the said Supreme Court to be a King's Court and to have jurisdiction over "His Majesty's subjects" in Bengal, Behar and Orissa and over all persons in the service of the United Company. Such were the main provisions of the Regulating Act. Its defects were many; it even failed to define who were to be regarded as subjects of His Majesty. But its greatest defect was to set up an English Court in India with English laws and procedure and with large powers not only over the entire executive, *i.e.*, Company's servants engaged in actual work of administration but also over the Legislature making the laws and regulations to be passed by the Governor-General and Council subject to the *veto* of the Supreme Court. In other words, the result of the Regulating Act was to set up two rival authorities in India—the Supreme

Council and the Supreme Court, and their rivalry which lasted for seven years soon threw the whole country into a state of utter confusion and brought administration to a standstill. The attempt to make the Legislature subordinate to the Judiciary (the Supreme Court) was never made even in England and has its parallel only in the constitution of the United States, but there it is so under a wholly different condition of things. Needless to say it was wholly unsuited to India in those days and the experiment proved a failure.

The Supreme Court at Calcutta; its vagaries and its conflict with Company's government.—The Supreme Court established at Calcutta by a Charter, dated the 26th of March, 1774, under the Regulating Act, was a King's Court and a Court of Record and not the Company's Court. It was also a Court of Oyer and Terminer and Gaol Delivery for the town of Calcutta. It was vested with full power and authority to exercise civil, criminal, admiralty, ecclesiastical, and equity jurisdiction over "His Majesty's subjects in the three Provinces and over all servants of the Company;" it was vested with power to veto all laws and regulations passed by the Governor-General and Council, thereby making the Legislature subordinate to the Judiciary. In fact, the object was to place the entire government of the Company, including its legislative powers, under the control of this Court consisting of a Chief Justice [29] and three other Judges familiar only with English laws and traditions but wholly ignorant of the then situation in this country or with the habits and customs of the people. A tribunal vested with such immense powers, set to work with a determination to flout and thwart the authority of

29. Sir Elijah Impey was the first Chief Justice of the Calcutta Supreme Court.

the Company in every direction. It refused to recognise the authority of the Civil and Criminal courts established by the Company; would issue writs of *habeas corpus* at the instance of persons who might have been arrested or detained in custody under processes of the Company's courts for non-payment of revenue or for other reason; would even issue processes against Judges and Magistrates of *moffusil* Courts on the complaint of any private party who might have been aggrieved or punished by such officers; would issue writs against zamindars; declared that it would not recognize Nabwab's government, and administration of criminal justice by such government; in short, wanted to bring collection and management of revenue as also administration of civil and criminal justice, entirely under its jurisdiction and control. In 1775, Maharaja Nundo Coomar [30] a highly respectable Brahmin who had charged Hastings with bribery, was put on his trial before the Supreme Court, sitting as a Court of Oyer and Terminer and Gaol Delivery on a charge of having forged a Persian document six years ago; 12 European jurors returned a verdict of guilty and the Court sentenced him to death and he was hanged on the 12th of August, 1775. The fate of the accused has not unjustly been characterised as an example of judicial murder, for, we have seen that it was only English Statute law as it had existed *prior* to 1726 that had been introduced within the Presidency towns, and it was not till the 29th of June, 1729, that forgery was made a felony punishable with death, by Statute Geo. II. Ch. 25. So, the Statute relating to forgery was never introduced and therefore Nundo Coomar, even if guilty of forgery, could not have been legally punished with capital sentence. In 1779, in the case of *the Raja of*

30. See 20 St. Tr., p. 923 (1775).

Cossijurat [30A] against whom a writ was issued by the Supreme Court but whom the Governor-General and Council instructed not to obey the writ, there was a regular pitched battle, so to say, between the forces of the Supreme Court and Company's government. In the words of Lord Macaulay the rule of the Supreme Court introduced a reign of terror. "No Maharatta invasion had ever spread through the province such dismay as this inroad of English lawyers, all the injustice of former oppressors, Asiatic and European, appeared as a blessing compared with the justice of the Supreme Court." [31]

Thus the attempt to control Company's government by the Crown through a King's Court administering English law and procedure, signally failed. Its interference destroyed the authority of the Provincial Courts, rendered collection of revenue almost impossible, and created a sense of insecurity and panic amongst the people. The people of Behar petitioned the Governor and Council for protection against the processes of the Supreme Court and at last, a petition by the European residents of Bengal was sent to Parliament against the Supreme Court. Eight years later in 1781, the Amending Act (21 Geo. III. c. 70) popularly known as the *Declaratory Act* was passed by Parliament with the object of remedying the defects of the former Act and setting limits to the jurisdiction of the Supreme Court. The subsequent history of the Supreme Court of Calcutta from its reconstitution in 1781 to its abolition on the establishment of the High Court in July, 1862, *i.e.*, for a period of eighty years is, however, altogether different. "The Supreme Court," says Mr. Cowell, "began in

30A. See Cowell, pp. 65-66.
31. Macaulay's Essays, Vol. III, p. 388 quoted in Cowell, p. 67.

discredit and with general reprobation, but finally obtained a lasting hold on the respect and confidence alike of Natives and Europeans.'' [32] By separate Charters [33] dated the 26th of December, 1800 and the 8th of December, 1823, Supreme Courts were established at Madras and Bombay respectively, and the Supreme Courts in the three Presidency towns continued to exist till they were abolished on the establishment of the High Courts in 1862 by Royal Charters issued under the High Courts Act of 1861. The *jurisdiction* of the Supreme Courts, *within* the limits of the three Presidency Towns, extended over all inhabitants, Natives and Europeans in all matters civil and criminal. *Outside* those limits, it extended over all European British subjects throughout India, in all matters, civil or criminal; over all persons whatsoever for crimes maritime; over Native servants of the East India Company or of any British subject for acts committed as such; and, over Native subjects in civil matters for transactions by which they bound themselves by bond to be amenable to the Supreme Courts.[33A] But they had no jurisdiction or controlling authority over the Company's moffusil tribunals.[33B] Even after the abolition to the Supreme Courts on the establishment of the High Courts, the jurisdiction of the Supreme Courts may, in a sense, be said to have survived in the High Courts in their *Original* side as the jurisdiction of the Sudder Dewanny Adwalats may be said to have survived in the High Courts in their *Appellate* side by reason of the High Courts inheriting all the powers and jurisdiction of *all* the courts which they replaced.

32. Cowell, p. 127.
33. For these Charters, see Morley's Digest, Vol. II.
33A. See Trevelyan's Civil Courts in India, Part II, Ch. II.
33B. See *Regina* v. *Shaik Boodin* (1846) Perry's Oriental Cases 434 (442).

Parliamentary Statutes relating to India (during the second period), and their main provisions.—

(1) *The East India Company Act of 1773* (13 Geo. III, c. 63), commonly known as the *Regulating Act.* Its main provisions have been already indicated.

(2) *The Amending Act of 1781* (21 Geo. III. c. 70), commonly known as the *Declaratory Act* or *the Settlement Act* which was passed to prevent further mischief arising from dissensions between the Supreme Court and the Governor-General and Council. Under this Act (*a*) Limits were set to the jurisdiction of the Supreme Court which was henceforth to have no jurisdiction in regard to any matter concerning revenue; or, over the Governor-General in Council jointly and severally, for acts done in their public capacity; or, over Judicial Officers of the Provincial Courts in regard to acts done in their judicial capacity—first recognition in India of the principle of "Judicial immunity"; and, in any proceeding Civil or Criminal, instituted in the Supreme Court, proof that the act complained of was done under an order in writing of the Governor-General in Council would be a complete defence,[33C] (*b*) Hindus and Mahomedans were declared to be entitled to be governed by their respective personal laws and not by the English law in suits relating to succession, Inheritance or Contract, instituted in the Supreme Court; (*c*) the Sudder and the Provincial Courts of the Company were recognised, the Governor-General in Council constituting the Chief Appellate Court; and (*d*) the Governor-General and Council were empowered to frame Regulations for the Provincial Courts, independently of the Supreme Court.

33C. This is rather going too far; for under English Constitution, not even the command of the sovereign would be any defence in an action for a wrongful act.

Power to disallow the Regulations was reserved to the Crown in Council.

This Act too had its defects—failed to define the relation of the Indian territories to the British Crown, to define who were "British subjects" and whether the term included the Indians, to define the jurisdiction of the Provincial Courts, and so on[34] Nevertheless the Declaratory Act of 1781 marked the *first stage in the growth of the Indian constitution.* By the recognition of the Company's Courts and restriction of the powers of the Supreme Court, by granting independent powers of legislation to the Governor-General in Council and by declaring the right of the Hindus and Mahomedans to be governed in matters of Inheritance, etc., by their own personal laws, this Act laid the foundation for a workable system of Government, both as regards Legislature and the Courts of Justice, which continued to exist so far as the main features were concerned down to 1861. Mr. Cowell in his valuable work says:[35] "The year 1781 marks the most important era in the history now under consideration. It terminated a period of fierce animosity and struggle between those who wished to see English Law and Court of Justice introduced at once into the country and rendered supreme over the executive, and those who considered such a policy as wholly impracticable—It commenced the era of independent Indian legislation; of the authority of the Supreme Court, as it continued more or less to be exercised for eighty years: of the establishment of a Board of Revenue; of the recognition by Act of Parliament of the established Sudder and Provincial Courts; and of the recognition by Act of Parliament and in the Revised Code of Bengal

34. See Cowell, p. 78.
35. Cowell, pp. 3-4.

of the right of Hindus and Mahomedans to be governed by their own laws and usages." The year 1781, says Mr. Cowell, is the dividing point of time which separates the previous history which was " one of military struggle and civil tumult interspersed with occasional efforts to organize society " from the period when " the boundaries of authority were strongly defined."

(3) *Pitt's Act of 1784* (24 Geo. III. c. 70) as modified by the *Charter Act of 1793* (33 Geo. III, c. 52).—The object of this Act was to control the policy of the Directors through Parliament; in other words, to make the Parliament and not the Company, the guiding hand in the Government of India. Under this Act, " Commissioners for the Affairs of India were appointed from amongst members of the Privy Council with powers to form a Board with a President, known as the *Board of Control* in order " to superintend, direct and control all acts, operations and concerns which in any wise relate to the Civil and Military Government or revenues of the British territorial possessions in the East Indies." All despatches from and to the Court of Directors were to pass through the hands of the Board and were liable to be cancelled or modified by the Board. The Governor-General, Governors, Members of Council and the Commander-in-Chief were to be appointed by the Court of Directors but liable to be dismissed or recalled by the Crown. The President of the Board of Control had a position somewhat similar to that now occupied by the Secretary of State for India in Council.

(4) *Statute of 1797* (37 Geo. III. c. 142. s. 8).—Although the Declaratory Act of 1781 had conferred on the Governor-General and Council authority to make Regulations only for the Provincial Courts, the Council, as a matter of fact, had since passed a very large number

of Regulations of a general Character which strictly speaking were in excess of its limited powers. The Statute of 1797 however, recognized the validity of these Regulations, thereby conferring on the Governor-General in Council by such Parliamentary recognition, the power of general legislation, concerning the rights, persons and property of the Natives and others amenable to the Provincial Courts, without restriction or limitation of any kind. It also declared that the Regulations were to be registered in the Judicial Department, copies thereof to be sent to the Court of Directors and to the Board of Control, and to be formed into a regular Code and the Provincial Courts to decide cases according to the rules and ordinances contained in such Regulations.

(5) *Statute of 1800* (39 and 40 Geo. III, c. 79, S. 11).—It gave to the Governor and Council of Madras the same powers as the Statute of 1781 had conferred on the Governor-General and Council of Fort William; with respect to territories subject to their government.

(6) *Statute of 1807* (47 Geo. III. S. 2, c. 68).—It conferred on the Governors in Council of Madras and Bombay powers such as had been conferred by the Statute of 1773 on the Governor-General in Council of Bengal, to make Rules and Regulations for the Towns of Madras and Bombay with Factories and Settlements subordinate thereto.

(7) *Statute of 1813* (53 Geo. III. c. 155).—By this Act the Legislative powers of the three Councils were further extended by empowering them to impose duties and taxes for the Presidency Towns and to make Articles of War, subject to further control by Parliament. Copies of all Regulations to be sent home and laid before Parliament. It was by Sec. 95 of this Act, as we have already observed, that the "undoubted sovereignty"

of the British Crown over the territories acquired by the East India Company was for the first time expressly declared. The Act is thus important as recognizing Indian subjects as subjects of the Crown and giving them the *Status of British subjects.*

(8) *The Charter Act of 1833* (3 and 4 Will. IV, c. 85).—This Statute marks *another important epoch* in the development of the Indian Constitution. The attention of Parliament was drawn to the defects of Indian Government. There were *threefold defects*—defects in the laws themselves, in the authority for making laws and in the manner of executing the laws. Referring to the hopeless confusion in the laws applicable in India at this period the Judges of the Supreme Court reported,[36] "There are English Acts of Parliament specially provided for India, and others of which it is doubtful whether they apply to India wholly, or in part, or not at all. There is the English Common Law and Constitution, of which the application is, in many respects, still more obscure and perplexed; Mahomedan Law and usage; Hindu Law, usage, and scripture; Charters and Letters Patent of the Crown; Regulations of the Governments, some made declaredly under Acts of Parliament, particularly authorizing them, and others which are founded, as some say, on the general power of government entrusted to the Company by Parliament, and as others assert on their rights as successors of the old Native Government; some Regulations require registry in the Supreme Court, others do not; some have effect generally throughout India, others are peculiar to one Presidency or one town. There are Commissions of the Governments, and Circular Orders from the Nizamat Adwalut and from the Dewanny Adwalut, treaties of the Crown and treaties

36. Hansard, quoted in Cowell, p. 97.

of the Indian Government. Accordingly this Act was passed in 1833 " for the better government of Her Majesty's Indian territories till April 30th, 1854." *The East India Company ceased to be a mercantile corporation,* and was to hold the Government of India in trust for the Crown. The Governor-General of Bengal was to be the Governor-General of India, and the whole Civil and Military Government, and the revenues vested in the Governor-General of India in Council; the Governor-General in Council was empowered, to make Laws and Regulations for all persons British, natives or foreigners, for *all* places and for *all* Courts whether established by Royal Charters or otherwise, in British India subject to certain limitations more or less similar to the limitations to the powers of the Indian Legislature laid down in successive Government of India Acts, down to the present Government of India Act of 1919.[37] The laws so passed were liable to be disallowed by the Court of Directors and were to be laid before Parliament, but, no longer required to be registered in any Court. Legislative powers were withdrawn from the Governors of Madras and Bombay who could only propose draft schemes. An extraordinary member (Law member) entitled to vote only at meetings for making laws was added to the Council of the Governor-General. The laws so passed were to be known as *Acts* and to have the same force as Acts of Parliament. Parliament's right to legislate for India was reserved. A clause (cl. 87) was inserted in the Act that no *Native* was to be disabled from holding any office under the Company simply by reason of birth, religion, etc.

Thus by this Act the Provincial Legislatures were superseded and one Central legislative authority estab-

37. See Sec. 65.

lished for the whole of British India with the Governor-General of India placed at the head of such authority. The Charter Act of 1833 is an important landmark in the history of the Indian Constitution as by establishing an *Imperial Legislature* for the whole of India empowered to legislate for all people without distinction of nationality and for all Courts, it laid the foundation for uniformity of laws for the whole of British India. It enabled the Indian Legislature, to replace, as it did later on though gradually and somewhat slowly, the indigenous Codes and forms of law hitherto followed, the Code of Regulations of the Government and the uncertain rules of justice, equity and good conscience applicable in the Moffusil and English law and procedure applicable in the Presidency Towns by a uniform system of territorial laws for the whole of British India such as the Indian Penal Code, the Contract Act, the Indian Succession Act, the Transfer of Property Act and so on or the Procedure laws such as the Criminal P. Code, the Civil P. Code, Evidence Act, etc.

(9) *Act of 1853* (16 and 17 Vic. c. 95).—By this Act control of the Crown was further increased. 6 out of 18 members of the Court of Directors were to be appointed by Crown and the appointment of the members of Councils in India by the Directors was to be subject to the approval of the Crown. The Act also made important changes both in the constitution and the working of the Governor-General's Council. New members known as *Legislative members six* in number, one appointed by each of the Local Governments, the Chief Justice and another Judge of the Supreme Court, were added to the Governor-General's Council, for legislative purposes. The introduction of representative members from the sister Presidencies into the Legislative Council is important as having led the way for the

re-establishment of Local Legislatures again by the India Councils Act of 1861. Bills were to be discussed in the Council in public instead of in secret; were to be referred to select Committees and when passed to have the assent of the Governor-General before coming into force. Formerly legislation was entirely the work of the Governor-General's Executive Council. This Act was therefore the *first attempt at separation of the functions* of the Executive and the Legislature and might be said to have inaugurated the *first Indian Legislative Council.*

(10) *Act of 1854* (17 and 18 Vic., c. 77).—It empowered the Governor-General of India in Council with sanction of the Board of Directors and the Board of Control, to take, by proclamation, any part of the territories under the East India Company under direct management and administration. It is under this power that the Governor-General appoints Chief-Commissioners for certain minor Provinces, to exercise such powers as are not reserved for the Central Government.

The Executive, the Legislature, and the Judiciary during the Second Period.—

(*i*) *The Executive.*—During the First Period rather up to the Regulating Act of 1773, the Factories and Settlements in the three Presidencies were under their respective Governors or Presidents and Councils, under the direct control of the Court of Directors but *wholly independent of one another.* During the Second Period, by the Regulating Act the Governments of Madras and Bombay were placed under the superintendence and control of the Governor-General in Council of Bengal, and later on, by the Charter Act of 1833, cl. 39, the Governor-General of Bengal was made Governor-General of India and " the superintendence, direction and con-

trol of the whole Civil and Military Government of all the Territories and Revenues in India were vested in the Governor-General and Counsellors to be styled "The Governor-General of India in Council." The Governor-General, Governors, Commander-in-Chief, and members of the Executive Councils were all servants of the Company, their appointment and dismissal being in the hands of the Directors. At Home, Commissioners for the Affairs of India were appointed by the Crown under the Great Seal, to form a Board with a President, known as the Board of Control, "with full power and authority to superintend, direct and control all acts, operations and concerns of the Company which in any wise related to or concerned the Government or Revenues of the said territories or the property vested in the Company in *trust for the Crown*" (cl. 25). The Court of Directors was also directed to appoint a secret committee through whom all confidential communications to be sent to the governments in India. Thus the Second Period was really a period of *double government, i.e.*, direct government by the Company and its servants under the Court of Directors, but controlled by the Crown and Parliament through the Board of Control.

(*ii*) *The Legislature.*—During the First Period, whatever legislative, judicial or executive powers were conferred by the Crown, by its Charters, on the Company, were meant to be exercised only over their English servants and over such native or foreign settlers in the Factories and Settlements as had placed themselves under their protection. During the Second Period, the Governor-General of Bengal in Council was at first vested with legislative powers of a *two-fold* character; one, under the Regulating Act of 1773 to make rules, ordinances and regulations (not repugnant to the laws of the realm) for the good order and civil government of the

Company's settlement at Fort William and places subordinate thereto which in order to be valid, were to be registered and published in the Supreme Court; and the other, under the Declaratory Act of 1781, to frame Regulations for the Provincial Courts, independently of the Supreme Court. We have seen that the Parliament in 1797, by recognizing the validity of a large number of Regulations of a *general* character which had been passed in the meantime for the people amenable to the Provincial Courts, confirmed such general power of legislation of the Governor-General independently of the Supreme Court. But it was not till 1833 that Parliament expressly vested the Governor-General of India in Council with powers of legislation for all persons, all places, and all courts in British India, subject of course to certain limitations, for, even up to the present day Indian Legislature does not possess absolutely free and unfettered legislative powers as are enjoyed by the Dominions.

As regards the *character of the Indian Legislature* at this period, it was in no sense a representative body and the laws passed by it were therefore no better than orders of Government, with this difference, that they were passed after open discussion in the Council, and liable to be criticized by the public at large, and, when passed, were binding equally on officials and non-officials. Nor was the Legislature a deliberative body like the British Parliament, with power to enquire into grievances, pass resolutions, call for information or examine the conduct of the executive.[38]

(*iii*) *The Judiciary.*—During the First Period whatever courts were established in the Company's Factories and Settlements were established under Royal Charters and were therefore King's Courts or Crown

38. See Cowell, pp. 122-123.

Courts which administered justice according to English law and procedure. During the Second Period there was a *double system of judiciary, viz.,* the *Crown Courts,* and *Company's Courts.*

(*a*) *Crown Courts.*—These were established by the Crown or Parliament and were originally meant for the Company's Factories. These factories later on became the three Presidency towns administering English law and English procedure both in regard to civil and criminal cases, except in civil suits against Hindus and Mahomedans where the personal law of the defendant was applied, and thus, there originated the distinction between the Presidency Towns and the Moffusil, where justice was administered by the Company's Courts and where English law had no application having never been introduced. In 1726 *Mayors' Courts* [39] were established at Madras, Bombay and Calcutta and re-established in 1753 when *Courts of Requests* for the trial of petty civil cases were also established at those places. In Calcutta, these courts existed till 1774 when the *Supreme Court* was established but in Madras and Bombay the Mayors' Courts existed till 1797 when they were replaced by the *Recorders' Courts* which were abolished in Madras in 1801, and in Bombay in 1823, on the establishment of the Supreme Court in those places. The *Supreme Courts* [40] in the three Presidency Towns continued to exist till the High Courts were established by Charters under the High Courts Act of 1861. The Courts of Requests were replaced by *Presidency Small Cause Courts* in 1850. There were other Crown Courts for the Presidency Towns, *e.g.*, Insolvency Courts, Admiralty Courts, Courts of Oyer and Terminer and Gaol Delivery

39. See *ante*, p. 355.
40. See *ante*, p. 364.

besides some other minor judicial offices such as Justices of the Peace, Presidency Magistrates and Coroners.

(*b*) *Company's Courts.*—From the moment of the acquisition of territories by the East India Company, Civil, Revenue and Criminal Courts were established. By what authority these Courts were established by the Company is rather a moot point. It is usually supposed that they were established under the powers of sovereignty delegated or transferred to the Company by the grant of the Dewanny. But by whatever authority they might have been established, it is certain Parliament by recognizing them by the Declaratory Act of 1781, recognized by implication, the authority to establish them. After various attempts at consolidation and organization by Clive and Hastings, Cornwallis in 1793, reorganized the entire system of judicature for Bengal. For a long time the Company's Courts exercised *jurisdiction* only over Indians and had no jurisdiction civil or criminal, over European British subjects. Although these courts were recognized by Parliament in 1781 which also vested them with *civil* jurisdiction over British-born subjects, and although the Indian Legislature in 1836 (Act XI of 1836) declared that no person was to be exempt from the *civil* jurisdiction of the Company's Courts by reason of birth or descent, yet even in the matter of administration of *civil* justice, distinction between British-born and Indian subjects was not fully removed until the abolition of the Supreme and Sudder Courts and the establishment of the High Courts. As regards administration of *criminal* justice, distinction continued to exist much longer, as regards procedure and courts. As Civil Courts, the Company established a number of *Dewanny Adwalats* in the Moffusil with the Sudder Dewanny Adwalat as the appellate court administering justice according to the Code of Regulations passed by the Governor-General in

Council, the personal laws of the Hindus and Mahomedans and the rules of justice, equity and good conscience. English law had not been introduced into the Moffusil. For sometime fiscal and judicial powers remained united in the same hands, and although in 1793 they were separated, revenue officers being deprived of all judicial powers, "the rival claims of the Revenue and Civil Courts to exclusive jurisdiction were destined to a long antagonism and to varying success."[41]. The *Sudder Dewanny Adwalat* though originally established by the Company was different from other Courts of the Company as it was made a Court of Record by Parliament in 1781, and appeals in cases above a certain value would lie to the Privy Council. At first the Governor-General and Council constituted the Sudder Dewanny Adwalat, but by Reg. II of 1801, it was made to consist of a Chief Judge and Puisne Judges. Its functions were not only to hear appeals from the Provincial Courts but also to superintend their conduct, revise their proceedings, remedy their defects and frame regulations for their guidance. As regards the *Nizamut* or administration of criminal justice it was left in the hands of the Nabwab until 1793, when the Governor-General and Council became the Sudder Nizamat Adwalat which from 1801 like the Sudder Dewanny Adwalat, came to be composed of a Chief Judge and Puisne Judges. Thus the year 1801 is important as effecting *separation between the judicial and executive organs* of Government. Barring the jurisdiction of the Supreme Court, Mahomedan Criminal Law was administered throughout the country until 1790 by Mahomedan tribunals under the Nawab, but subject to the supervision by Company's servants. In the Presidencies of Madras and Bombay also Provincial Civil and

41. Cowell, p. 152.

Criminal Courts with their appellate *Sudder Dewani* and *Sudder Fouzdari Adwalat* were established on the model of the Bengal system of 1793.

Results of the double system of Judiciary.—(1) It maintained a distinction between the Indians and the British-born ; (2) prevented equality of status for a long time ; (3) perpetuated the difference between the Presidency Towns and the Moffusil ; (4) prevented a uniform system of courts and laws for the whole country ; and (5) caused great inconvenience by reason of difference in laws and procedure followed in the Presidency Towns and in the Moffusil.

Summary of the progress made in the Indian constitution during the Second Period.—(1) Recognition by Parliament in 1781, of the right of the Hindus and Mahomedans to be governed by their respective personal laws in matters of Inheritance, etc.; of the courts established by the Company, and of the principle of judicial immunity for acts done in the exercise of judicial authority; of independent powers of legislation without interference by the judiciary (Supreme Court). (2) Greater control and supervision by Parliament over the affairs of the Company from 1784. (3) Consolidation and reorganization of Company's Courts in 1793. (4) Recognition of general powers of legislation for all people amenable to Company's Courts in 1797. (5) Establishment of an Imperial Legislature with plenary powers of legislation for the whole of India, thus laying the foundation for a system of uniform laws for the whole country and for all people. (6) Separation of the Executive and Judicial functions of Government in 1801. And (7) separation in 1853 of the Legislature from the Executive as a distinct branch of Government and introduction of representatives from the sister Presidencies

which led the way to the re-establishment of Local Legislatures in 1861.

(C) **Third Period (1858-1917).**—This is the *period of direct Government of India by the Crown of England.* It extended from the assumption of Government by the Crown, immediately after the Sepoy Mutiny, to the declaration of the future policy of Government, made by the Secretary of State for India before the House of Commons on the 20th of August, 1917. After the Sepoy Mutiny, it was thought desirable that the Government of India should be in the hands of persons who would be responsible to the Parliament and the public and not entrusted to an irresponsible body like the Court of Directors. With this object the *Government of India Act of* 1858 (21 and 22 Vic. c. 106) was passed which put an end to Company's rule by transferring the Government of India from the Company to the Crown and terminated the cumbrous system of double government hitherto followed. By this Act, all the territories, revenues, etc., in possession of the Company were vested in Her Majesty in whose name India was to be governed; all powers and duties hitherto exercised by the Company, the Court of Directors or the Court of Proprietors, either singly or under the direction of the Commissioners for the Affairs of India, to be exercised by the *Secretary of State for India* who was to be assisted by a Council of 15 members called the *India Council*; and, the Secretary of State for India in Council was made a body corporate for purposes of suing and being sued. The Act was followed by a *Royal Proclamation* dated the 1st of November, 1858 regarded as the *Magna Charta of India* couched in words befitting a noble Queen, by which the Princes of India were assured that their treaties with the East India Company and their rights and dignity will be scrupulously respected; and the Indian subjects of Her Majesty

were assured of equality of status with other subjects, strict non-interference with their religious belief or worship, and eligibility for all offices without considerations of race or creed. By the Proclamation, Lord Canning was made the first *Viceroy* and Governor-General of India.

Other Parliamentary statutes affecting India during the Third Period.—

(1) *The India Councils Act of* 1861 (24 and 25 Vic. c. 67).—The Act was passed to consolidate and amend former Acts of Parliament respecting the constitution and functions of the Council of the Governor-General of India, to give power to the Governors in Council of Madras and Bombay to make laws and regulations for those Provinces, and to enable like legislative authority to be constituted in other parts of Her Majesty's Indian dominions. Many of the provisions of this Act formed the framework of future Government of India Acts. Its main provisions were: (*a*) Previous sanction of the Governor-General necessary for introduction of measures affecting revenue, religion, Army and Navy and relations with foreign Princes and states: (*b*) subsequent assent of the Governor-General necessary for all laws passed by the Council: (*c*) Legislative powers of the Council to extend to repeal, amend or alter all laws and regulations in force in British India, and to make laws for *all persons*, all *courts* all places within British India and for Government servants within the dominions of Princes and states in alliance with Her Majesty: (*d*) No law or regulations passed to be invalid merely by reason of its affecting the prerogative of the Crown: (*e*) Governor-General was empowered to make and promulgate *ordinances* in case of emergencies, for the peace and good government of the territories for a period not exceeding 6

months, subject to being disallowed by Her Majesty or superseded by an Act of the Legislative Council : (*f*) Governors in Council of Madras and Bombay were empowered to make laws for those Provinces, subject to the assent, when passed, of the respective Governors and also of the Governor-General : (*g*) Previous sanction of the Governor-General necessary for introduction of measures of All-India importance into the Provincial Councils, such as Public Debt, Customs, Coinage, Paper Currency, Post Office, Telegraph, Army and Navy, etc. : (*h*) Power given to the Governor-General in Council, subject to previous assent of the Crown, to establish by proclamation other local legislatures and appoint Lieutenant-Governors and to fix and alter the limits of any Presidency or Province : (*i*) Legislative force given to all orders and rules for the *Non-Regulation Provinces* issued prior to this Act by the Executive Government :[42] and (*j*) for the better exercise of the power of making laws and regulations, a certain number of *additional members* to be nominated and summoned for a term of two years, of *whom at least half to be non-officials*, to the Governor-General's Council, and the Councils of Madras and Bombay to attend meetings of the Councils held for the purpose of making laws and regulations. This provision marks a very important stage in the progress of the Indian constitution as it recognised for the first time the principle of giving to non-officials and *Indians a share in the work of legislation.* The laws passed by the Governor General's Council were subject to assent of the Governor-General and veto by the Crown, and those passed by the Provincial Councils, to further assent by their respective Governors. The legislative powers of

42. Since this Act, the Governor-General's Council possesses the sole Legislative authority for the Non-Regulation Provinces. See, Cowell, p. 125

the Governor-General's Council were subject as usual, to many restrictions and limitations, *viz.*, not to affect any of the provisions of this Act or of any Act passed in the present session of Parliament, or hereafter to be passed affecting India, or the provisions of certain other statutes specified in cl. 22, such as the Government of India Act of 1858 (21 and 22 Vic. c. 106), etc.

(2) *High Courts Act of* 1861 (24 and 25 Vic. c. 104). —After the assumption of Government by the Crown, the double system of judiciary and the distinction between Presidency-Towns with their anomalous law and procedure and the Moffusil were considered to be most objectionable. In order to establish one uniform system of laws and judiciary for the whole country, the High Courts Act of 1861 as part of a larger scheme was passed in the same session of the Parliament which passed the India Councils Act. By this Act, the Crown was empowered to establish by Letters Patent under the Great Seal of the United Kingdom, High Courts at Calcutta, Madras, Bombay and at one other place.[43] The Act further declared that on the establishment of such High Courts, the Supreme Courts and the Sadder Dewanny and Fouzdary Adwalats in the three Presidencies were to be abolished; that subject to the Letters Patent and to the legislative powers of the Governor-General in Council,[44] the High Courts to exercise every power and authority then vested in the Courts abolished. Thereupon Letters Patent [45] or Charters were issued in 1862 constituting

43. By virtue of this authority Letters Patent were issued in March, 1866, establishing the *Allahabad High Court.*

44. It has been held by Rankin C. J., that the provisions of the Letters Patent could be altered by the Governor-General in Council; see *Girindra* v. *Birendra*, 31 C. W. N. 593 (612).

45. First Letters Patent establishing High Court at Calcutta were dated 14th May, 1862, and at Madras and Bombay were dated the 26th of June, 1862; the revised Letters Patent for all the three High Courts, which were exactly in the same terms were dated 28th of December, 1865.

High Courts at Calcutta, Madras and Bombay; new and revised charters for those courts were again issued in 1865. There were two other High Court Acts, the High Court Act of 1865 (28 and 29 Vic. c. 15) and the High Court Act of 1911 (1 and 2 Geo. V. c. 18). All the three High Court Acts have been repealed by the Government of India Act of 1915 (5 and 6 Geo. V. c. 61).

(3) *Government of India Act of 1865* (28 and 29 Vic. c. 17), by which the legislative powers of the Governor-General's Council were extended to all British subjects in Native States, whether servants of the Crown or not.

(4) *Government of India Act of 1869* (32 and 33 Vic. c. 98), by which the legislative powers were further extended to all Native subjects of the Crown in any part of the world.

(5) *The India Councils Act of 1892* (55 and 56 Vic. ch. 14).—This Act marks *another landmark* in the history of the Indian Constitution, for it introduced *three* important changes in the Councils, Supreme and Provincial, both in regard to their functions and their constitution. The changes were, the right of discussing the budget (not item by item), the right of interpellation, and, what is most important, the introduction (indirectly) of the elective principle. It increased the number of additional members for the purpose of making laws and regulations and authorized the Governor-General in Council, with the approval of the Secretary of State in Council, to frame regulations for the nomination of additional members of the Legislative Councils of the Governor-General, Governors and Lieutenant-Governors. And, " as the recommendations of the nominating bodies came to be accepted as a matter of course, the fact of election to an appreciable proportion of the non-official seats was firmly established." Thus the Act though not

embodying *the elective principle* in so many words, did *in fact* recognise it.

(6) *The India Councils Act of 1909* (9 Edw. VII c. 4).—This Act is usually known as the *Morley-Minto Act*. It marks another very important stage, for it touches almost the *limiting point of constitutional advance under autocratic government*. Further constitutional advance retaining at the same time autocratic form of government was well nigh impossible. To quote Lord Chelmsford "The impulses which had led to the Reforms of 1892 continued to operate, and they were reinforced by external events, such as the Russo-Japanese War. Important classes were learning to realize their own position, to estimate for themselves their own capacities, and to compare their claims for equalities of citizenship with those of the British race. India was, in fact, developing a national self-consciousness. The Morley-Minto Reforms were a courageous and sincere effort to adjust the structure of the Government to these changes." Under this Act "the Legislative Councils were greatly enlarged, the official majority was abandoned in the local Councils, and the principle of election was legally admitted. No less significant were the alterations made in the functions of the Councils. These were now empowered to discuss the Budget at length; to propose resolutions on it and to divide upon them; and not only on the Budget, but in all matters of public importance, resolutions might be moved and divisions taken. The constitution under this Act gave Indians much wider opportunities for the expression of their views and greatly increased their power of influencing the policy of Government and its administration of public business."

(7) *The Indian High Courts Act of 1911* (1 and 2 Geo V. c. 18), by which the maximum number of judges was fixed at 20; the Crown was empowered to establish

new High Courts ;[46] and Governor-General was authorized to appoint temporary additional judges.

(8) *The Government of India Act of 1912* (2 and 3 Geo. V. c. 6), by which the Governor of Bengal was placed upon a footing of equality with the Governors of Madras and Bombay; an executive council was created for the new Lieutenant-Governorship of Behar and Orissa; and the Governor-General was authorized to create Legislative Councils for the territories under Chief Commissioners.

(9) *The Government of India Act of 1915* (5 and 6 Geo. V. c. 61). This is a consolidating Act, repealing and re-enacting all the Parliamentary statutes relating to India passed from 1770 to 1912. This Act is amended in certain minor respects by the *Government of India Amendment Act of 1916* (9 and 10 Geo. V. c. 101) and later on, most vitally by the *Government of India Act of 1919* (9 and 10 Geo. V. ch. 101), and thus amended constitutes *the present Government of India Act.*

Notable Events during the third period.—Before referring to the notable events, both within and outside India, which had an indirect but important bearing on the question of constitutional progress by rousing national consciousness and national aspirations, sometimes encouraged and sometimes repressed by the rulers, mention ought to be made of the great political organization, *viz.*, the *Indian National Congress.* Since its establishment in 1885, by persistent agitation it has not only influenced the Government in regard to the policy and measures affecting India but what is far more important, has created and organized public opinion, evoked political consciousness and unified in no small measure the various races and creeds of India. Of the notable

46. Under the power the High Court at *Patna* was established by Letters Patent, dated 9th February, 1916.

events, first and foremost stand the Assumption of direct government by the Crown and the Proclamation of Queen Victoria. Other events were : the Boer war ; the Russo-Japanese war ; Edward VII's Proclamation on the 50th anniversary of the assumption of government by the Crown ; Partition of Bengal ; Revolutionary movement in Bengal ; the Royal visit of King-Emperor George V with the Queen to India—an event of unusual significance being the first instance when a British sovereign set foot on Indian soil forging thereby as it were, " the final link of gold " between the two countries ; modification of the Bengal Partition which unsettled a " settled fact " under pressure of popular agitation ; the great European War ; and, President Wilson's declaration of the principle of self-determination.

Summary of Constitutional progress during the third period.—During this period the reforms were, at first in the direction of the *mechanical framework of the government*—codification of laws, organization of the Police, establishment of the High Courts, abolition of the dual system of judiciary, consolidation of the three Presidencies under the legislative and administrative authority of the Governor-General of India, and so on. At the same time, from the beginning of this period, at any rate from the India Councils Act of 1861, *the principle of associating the people with the Government* and *that of representative institutions* were definitely recognised. In Legislature, *the elective principle* was at first cautiously and indirectly, and later on in the Morley-Minto Act, directly and expressly recognised. But even under the Morley-Minto Act, the Government remained essentially autocratic. To quote Lord Chelmsford again " *the element of responsibility was entirely lacking.* The ultimate decision rested in all cases with the Government, and the Councils were left with no functions

save that of criticism. The principle of autocracy, though much qualified, was still maintained."

(D) Fourth Period; from the declaration of August 1917 down to the present time.—This is the most momentous epoch through which the country is now passing. It was ushered by the famous declaration of an altogether *new policy* for the Government of India, made on behalf of the British Government and the British Parliament by Mr. Montagu, the then Secretary of State for India, before the House of Commons on the 20th of August, 1917. The declaration made was to the effect that *the principle of autocracy* which was hitherto followed in the Government of India *was to be abandoned* and in its place *Responsible Government, that is, complete Self-Government within the Empire, was to be introduced* into India by successive stages. "This new policy was given definite form and expression" in the Government of India Act of 1919 (9 and 10 Geo. V. ch. 101) popularly known as the *Montagu-Chelmsford Act.* The Government of India Act of 1915 therefore, as amended by the Act of 1919 has given to India its *present constitution.*

Present Government of India Act.[47]—The Government of India Act of 1915 (5 and 6 Geo. V. c. 61) as amended by the Act of 1916 (6 and 7 Geo. V. c. 37) and the Act of 1919 (9 and 10 Geo. V. c. 101) introducing the Montagu-Chelmsford Reforms, is the present Government of India Act, giving the country its *new constitution.* The new Constitution is at present in a provisional, transitional and experimental stage. As the readers are supposed to be familiar with its provisions which are now being daily discussed in the Press, the Platform and the Council Chambers it would be unnecessary to examine

47. For a critical examination of the Act, see Rhodes Lectures by Ilbert and Meston, the Indian Constitution by Sir Tej Bahadur Sapru, and India, A Federation? by Sir Frederick Whyte.

them in elaborate detail. Moreover as the Statutory Commission in accordance with the provisions of Sec. 84A of the Act has already been constituted with Sir John Simon as its Chairman, the provisions of the Act will be minutely scrutinized before it in the light of the experiences of the last ten years, in order to enable the Commission " to report as to whether and to what extent it is desirable to establish the principle of responsible government, or to extend, modify or restrict the degree of responsible government then existing, etc." [47A] It is therefore proposed to close the chapter here after briefly indicating some of the important features of the Act and some of its main defects.

The Preamble of the Act of 1919.—The *Preamble* is in these words ·

Whereas it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of the Indian administration, and for the gradual development of self-governing institutions, with a view to the progressive realization of Responsible Government in British India as an integral part of the Empire ;

And wheras progress in giving effect to this policy can only be achieved by successive stages and it is expedient that substantial steps in this direction should now be taken ; And whereas the time and manner of each advance can be determined only by Parliament, upon whom responsibility lies for the welfare and advancement of the Indian peoples ;

And whereas the action of Parliament in such matters must be guided by the co-operation received from

47A. " Including the question whether the establishment of Second Chambers of the Local Legislatures is or is not desirable." The following is the *personnel* of the Commission—Right Hon. Sir John Simon, Viscount Burnham, Lord Strathcona, Hon. E. C. G. Cadogan, Rt. Hon. G. Lane-Fox, Major C. R. Attlee and Mr. V. Hartshorn.

those on whom new opportunities of service will be conferred, and by the extent to which it is found that confidence can be reposed in their sense of responsibility;

And whereas, concurrently with the gradual development of self-governing institutions in Provinces in India, it is expedient to give to those Provinces in provincial matters the largest measure of independence of the Government of India which is compatible with the due discharge by the latter of its own responsibilities;

Be it therefore enacted by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in the present Parliament assembled, and by the authority of the same, as follows:

Object and policy of the Act of 1919.—The objects as indicated in the Preamble are mainly (1) Progressive realization of Responsible Government in British India as an integral part of the Empire; and (2) Giving to the Provinces in provincial matters the largest measure of independence of the Government of India which is compatible with the due discharge by the latter of its own responsibilities. In other words, the objects are (1) to introduce gradually Responsible Government in British India and (2) to introduce Provincial autonomy by emancipating as far as possible, local Governments and local Legislatures from Central Control. *Responsible Government* means Government responsible to the people, *i.e.*, to the elected representatives of the people in the Legislature, liable to be removed and replaced when it ceases to retain the confidence of such Legislature. This is the meaning of Responsible Government such as is enjoyed by the Dominions. Now *the Act of 1919 has made no attempt to introduce this principle into the Central Government*; and, as regards *Provincial Governments, the*

principle has been applied only partially in regard to a portion of the duties, *viz.*, what are called "transferred" subjects under the system known as *dyarchy*. As regards the second object, *viz.*, *Provincial autonomy*, the Act in the first place regulates *the relation between the Central and Local Governments* by laying down the principles on which powers, duties and responsibilities are to be *devolved* from the Central Government to the Provincial Governments, *and leaves the extent and conditions of the devolution to be settled by statutory rules.* In the next place, it distinguishes between Central and Provincial subjects. Under Sec. 45A provision may be made *by rules* under the Act (devolution rules) (*a*) for classification of subjects as central and provincial; (*b*) for the devolution of authority in respect of provincial subjects to local governments and for the allocation of revenues; and (*c*) for the transfer from amongst the provincial subjects, of subjects referred to as " transferred subjects " to the administration of the Governor acting with Ministers appointed under the Act, and for allocation of revenues for the purpose of such administration. Thus the *policy of the Act is mainly one of decentralization and devolution* so far as thought to be prudent at present.

Is the Constitution Rigid or Flexible.—The present Indian Constitution is partly rigid and partly flexible. It is of course, essentially a rigid constitution being a creature of the Imperial Parliament by which alone the provisions of the Act can be altered or amended, the Indian Legislature being helpless to alter them. At the same time, Parliament, by conferring large powers of delegated legislation by means of ' rules and orders ' under the provisions of the Government of India Act, has made the constitution eminently elastic and flexible.[48] Thus in

48. See The New Constitution of India by Ilbert and Meston, 28-30.

regard to many matters,[49] rules may be framed under the Act, such as electoral rules, devolution rules, rules about conduct of business in the legislatures, about borrowing powers of Provincial Legislatures, about allocation of subjects as reserved and transferred, control by the Secretary of State and so on. Although the sections of the Act are comparatively small in number, the constitution is made workable with the help of a large body of statutory rules and orders framed under delegated legislative authority, making the constitution to a great extent elastic or flexible, but at the same time cumbrous and complex. To take one example ; clause (3) of Sec. 45A of the Act says that the powers of superintendence, direction and control over local governments vested in the Governor-General in Council under the Act shall, in relation to *transferred* subjects, be exercised only for such purpose *as may be specified in rules made under the Act.* So to find out for what purposes the Governor-General in Council can exercise such powers of superintendence, etc., we have to turn to Rule 49 of the Devolution Rules framed under this Section.

Is the Constitution Unitary or Federal.—Whether unitary form with a strong central government or federal form with full provincial autonomy would be good for India, circumstanced as it is, with its manifold races, creeds and sects, is rather a vexed question. The present Indian constitution is essentially unitary, the Central Government having control over all Provincial Governments and Legislatures throughout British India.[49A] At the same time, the Indian constitution, with its provisions

49. Thus power is conferred by Sec. 64 and Sec. 72A to make *Electoral rules*, by Sec. 45A and 129A to make Devolution Rules, by Sec. 30 (1A) and 129(A) to make Local Government (Borrowing) Rules, by Sec. 19A, rules about relaxation of control by the Secretary of State and so on.

49A. See Sec. 45; see *post* under "Local Governments."

for provincial autonomy, its division of Central and Provincial subjects and its rules for devolution of powers has been framed with an eye to the ultimate federal system. The fifth paragraph of the Preamble, rightly observes Sir Frederick Whyte, is a finger-post to ultimate federalism The Joint Select Committee on the Government of India Bill also observed " India is not *yet* ripe for a true federal system, and the central government cannot be relegated to mere inspection and report." Unless and until " the federal sentiment " is fully developed and Indian nationality created, until, in short, there is a harmonious blending of the local and communal patriotism with the national and larger Indian patriotism, true federalism cannot be firmly established in India.

The Executive:

(*a*) *The Crown.* The Crown is the supreme executive in India as in all other parts of the Empire; the nominal head of every department. By section 1 of the Government of India Act, all the territories in British India are vested in His Majesty in whose name the country is governed. The *powers of the Crown* include (*i*) prerogatives under common law, *e.g.*, of declaring war, making peace and treaties, annexing or ceding territories, of pardon, escheat and so on; and (*ii*) statutory powers conferred under various sections of the Government of India Act, *e.g.*, appointment of Governor-General, Governors, High Commissioner, members of the Executive Councils of the Governor-General and of Governors, Chief Justices and Judges of the High Courts, Advocate General, etc.; removal from office of any member of the Council of India on an address of both Houses of Parliament; power of veto in regard to Acts of the Indian and local Legislatures and Bills reserved for His Majesty's pleasure under sec. 68; assent of the Crown

is necessary for Acts certified by the Governor-General or by a Governor, and so on. The powers of the Crown, according to the modern convention under English Constitution are exercised on the advice of Ministers.

(b) *The Secretary of State for India.*—His position is defined by sec. 2 of the Government of India Act, by which he is vested, subject to the provisions of the Act, with all powers and duties formerly exercised by the East India Company, and with general powers of superintendence, direction and control over all acts, operations and concerns which relate to the government or revenues of India. Sec. 33 enacts that the Governor-General in Council is required to pay due obedience to all such orders as he may receive from the Secretary of State. Then there are various provisions[50] in the Act which expressly declare that previous sanction or subsequent assent of the Secretary of State must be obtained. In addition to these statutory powers, he exercises also vast control *indirectly*. There is hardly any measure of importance in regard to which there is not previous correspondence by despatches or by cablegrams between the Government of India and the Secretary of State. The Government of India is constitutionally wholly subordinate to the Secretary of State who possesses practically plenary powers of control over administrative and financial affairs of India. The description of the Government of India by Lord Curzon "as a subordinate branch of the British Government 2,000 miles away" is no doubt theoretically true, but in practice it often resolves itself into a question of

50. *E.g.*, secs. 41, 44, proviso to sec. 45A, sec. 21, sec. 65, cl. (3), sec. 69 (Crown's power of veto, which under the constitution is exercised on the advice of Ministers and therefore of the Secretary of State), sec. 71, cl. (3) and (4), sec. 72 (ordinances), sec. 82 (Crown's power of veto of Act of Local Legislatures) and so on.

personality—"the relations between Simla and Whitehall vary also with the personal equation," a strong Governor-General overcoming a weak Secretary of State and *vice versa.* The Secretary of State is responsible to the British Parliament and by this Act, his salary is placed on the British Estimates. He is a member of Parliament, of the Cabinet and of the Privy Council. So long as the Government of India is not made responsible to the Indian Legislature, it is rather better that it should remain subordinate to the Secretary of State who is an agent of the Parliament and is responsible to it.

(c) *The India Council.*—The Council of India is, in a sense, the successor of the Court of Directors and was created by the Government of India Act of 1858, on the direct assumption of Government by the Crown. The object was that the Minister responsible to Parliament for the Government of India should be assisted by persons with Indian experience. The composition, powers, etc., of the Council are defined in the Act.[51] By sec. 19A the Secretary of State in Council is empowered to make *rules* to regulate and restrict the exercise of the powers of superintendence, direction and control vested in the Secretary of State in Council or the Secretary of State under the Act, but such rules if relating to *transferred subjects* to be laid before both Houses of Parliament and would be void if annulled by His Majesty on an address by either house; and if relating to *subjects other than transferred,* to be laid in draft before both houses, but not to be made unless approved by both houses by resolution. The Council sits in London, and is composed of eight to twelve members appointed by the Secretary of State, half of whom must have served or

51. Secs. 3 to 22.

resided in India for at least ten years. By sec. 32, the Secretary of State in Council has been given a corporate character for the purposes of suing and being sued.[52]

(*d*) *The Governor-General in Council.*—It means the Governor-General and his Executive Council usually described as the *Government of India.* The constitutional position of the Governor-General in Council is defined in sec. 33 under which the civil and military government is vested in him subject to the provisions of the Act and the Rules made thereunder, and subject to the general control of the Secretary of State. The members of the Governor-General's executive council are appointed by His Majesty by warrant under the Royal Sign Manual. The number of members is not fixed but may be such as His Majesty may think fit but must include amongst them at least three persons who have been at least for ten years in service of the Crown in India, and also a lawyer member, a barrister or a pleader of a High Court of not less than ten years' standing.[53] The commander-in-chief and also the Governors of Madras and Bombay when meetings are held within their Presidencies are to be extraordinary members of the executive council. In case of difference of opinion the Governor-General shall be bound by the decision of the majority; he has a second or casting vote when opinion is equally divided; but in regard to measures affecting the safety, tranquillity or interests of British India or any part thereof the Governor-General may override the Council and act on his own authority.[54] It would be of interest to note the *difference between an English Cabinet and Governor-General's Council.* Apart from the statutory power of

52. See *ante*.
53. See sec. 36.
54. Sec. 41.

the Governor-General to override the Council in certain cases, in a cabinet, the members belong to the same political party with a common policy and common political ideals whereas it is not necessarily so in the Executive Council of the Governor-General. Again, in a cabinet, the members are selected by the Premier, in the Council, by the Crown. Lastly and what is most important, an English Cabinet is responsible to and removable by the Parliament whereas it is not so in the case of the Executive Council, the Indian Legislature having no control over it. The executive work is distributed in different departments, *viz.*, Finance, Foreign (directly under the Governor-General), Home, Legislative, Revenue and Military Supply, placed under different members and administered by Secretaries who if they choose can take any file to the Governor-General and obtain his orders without the intervention of the member concerned.[55] There are also other departments such as the Post Office, Telegraph, Survey, Railways, etc., attached to the portfolios of one or other of the above members and centrally administered; and some departments, such as Forests, Agriculture, Education, Medical Service, etc., are administered by local Governments under the supervision of the Government of India.

(*e*) *The Governor-General.*[56]—In addition to the powers vested in the Governor-General in Council, the Governor-General *individually* is also vested with certain statutory powers relating to administrative, financial and legislative matters. The *administrative powers* relate to appointments to certain offices, such as Lieutenant-Governors, sec. 54, President of the Council of State,

55. See Indian Constitution by Sir Tej Bahadur Sapru, p. 47.
56. See Sapru's Indian Constitution.

sec. 63, A.2, President of the Legislative Assembly, sec. 63 C.I., Vice-President of the Executive Council, sec. 38, and so on ; to the maintenance of peace and order such as power to make ordinances, sec. 72, to override Executive Council, sec. 41, cl. 2, and so on ; and other administrative acts such as to summon meetings of Legislature, to prorogue the sessions or dissolve the chambers and so on. As regards his *statutory financial powers* the most important is that no proposal for the appropriation of any revenue or moneys for any purpose shall be made except on the recommendation of the Governor-General, sec. 67A(2). As regards his *legislative powers*, reference may be made to sec. 67 under which previous sanction of the Governor-General is necessary before measures of a certain kind, *e.g.*, relating to public debt, etc., religion, discipline of the army, etc., foreign relations, etc., can be introduced into the Indian Legislature, and to sec. 80A(3) for introduction of Bills of a certain class into the Local Legislatures ; power to certify a Bill under sec. 67B ; power to stop the introduction of a Bill under 67 (2*a*) ; power to withhold assent from, or reserve for signification of His Majesty's pleasure, a Bill passed by the Indian Legislature, sec. 68 ; power to withhold assent to Acts passed by local Legislatures, sec. 81(3) and so on. The Government of India Act has conferred much larger powers on the Governor-General of India than is possessed by Governors in the Dominions who under their constitution are bound to act on the advice of responsible Ministers. Besides the Statutory powers, the Governor-General of India who since 1858 has also been made the *Viceroy* of India, is by his warrant of appointment or instrument of instructions, sometimes vested with certain *Prerogative powers* such as the power to grant pardon to offenders convicted by Courts of Justice.

(*f*) *Local Governments.*—Local Government means in the case of a Governor's Province, the Governor in Council or the Governor acting with the Ministers, as the case may be; and in the case of other Provinces, it means a Lieutenant-Governor or Chief-Commissioner (sec. 134). There are *eight* Governor's Provinces—Madras, Bombay, Bengal, United Provinces, Punjab, Bihar and Orissa, Central Provinces and Assam; *one* Lieutenant-Governor's Province, *viz.*, Coorg; and *five* Provinces administered by Chief-Commissioners—N. W. Frontier Provinces, British Baluchistan, Delhi, Ajmer-Merwara, and the Andaman and Nicobar Islands. The Governor-General in Council with the previous sanction of His Majesty may, by notification, constitute a new Governor's Province,[57] or declare any territory in British India to be "a backward tract" (sec. 52A). Every local Government is under the superintendence, direction and control of the Governor-General in Council (sec. 45), and thus Indian government is *essentially unitary* in form. At the same time, however, as we have seen before, the general scheme of the Act has been to introduce into the Governor's Provinces *partial autonomy* and *partial responsible government.* This has been effected by providing[58] by means of Rules framed under the Act, for classification of subjects as "Central" and "Provincial" to distinguish the functions of Central Government and Central Legislature from those of the Local Government and Local Legislature and for the transfer of some subjects from amongst the "Provincial" subjects to the administration of the Governor acting with Ministers appointed under the Act, such subjects being known as "*trans-*

57. Thus *Burma* was constituted a Governor's Province with effect from January 2, 1923.

58. See sec. 45A and Dev. Rule 3 and Sch. I of the Dev. Rules.

ferred " subjects[59] as distinguished from the remaining provincial subjects known as "*reserved*" subjects administered by the Governor in Council, *i.e.*, by members of the Executive Council. The powers of control of the Governor-General in Council of the "transferred" subjects are restricted, being exercised only for such purposes as may be specified in Rules made under this Act.[60] This system of dual government usually known as *dyarchy* introduced in the Governor's Provinces is an outstanding feature of the Act. It is a compromise between responsible and irresponsible government.[61] It should also be noted that while the members of the Executive Council act on the principle of collective responsibility, the Ministers act on their own individual responsibility, being responsible to the Legislature. The Governors and members of the Executive Councils are appointed by the Crown. Bengal, Bombay and Madras has each four members in the Executive Council, two belonging to the Indian Civil Service and two non-officials. The other Governor's Provinces have each two members in the Executive Council.

The Legislature:

(*a*) *The Indian Legislature*:[62] *Its constitution*, etc. —The Indian Legislature is bi-cameral, consisting of two Chambers, the Legislative Assembly corresponding to the House of Commons, and the Council of State corresponding to the House of Lords. A Bill is not deemed to have been passed unless it has been agreed to by both Chambers either without, or with *agreed* amendments. The

59. See Dev. Rule 6 and Sch. II of the Rules.
60. Sec. 45A (3).
61. See Ilbert, p. 19.
62. See Part VI, sections 63-72, Government of India Act.

Governor-General is not a member of either Chamber but has the right to address it or to summon or prorogue a session. Each Chamber has a President or Speaker of the House, that of the Assembly elected from amongst its members and approved by the Governor-General, and that of the Council of State appointed by the Governor-General from amongst the members of the Council. The Assembly has also an elected Deputy President approved by the Governor-General. Both Chambers consist of members nominated and elected. The number of members of the Assembly[63] is 140, of whom 100 is to be elected and 40 nominated and amongst the latter, 26 to be officials and 14 non-officials. The number of members may be increased under statutory rules. The number of members of the Council of State is not to exceed 60, of whom not more than 20 are to be officials. Thus there is a majority of non-official elected members in both chambers. Life of the Assembly and of the Council of State is 3 years and 5 years respectively but the Governor-General may *dissolve* either Chamber earlier or under special circumstances extend its duration. After dissolution of either chamber the Governor-General is bound to appoint a date, not later than six months, or nine months with the sanction of the Secretary of State, for the next session of that Chamber. The members of the Governor-General's Executive Council are all to be nominated members of one or the other Chamber but not of both. As in the Provincial Councils, much is left to be done by statutory rules under sec. 64 supplemented if necessary by standing orders, such as in regard to the term of office of the nominated members, qualification of members and electors, constitution of constituencies,

63. Under Rules framed, there may be 103 elected and 41 nominated members.

method of election, settlement of election disputes, etc. Aliens, females (except in Provinces where the sex disqualification has been removed), lunatics and minors (under 21) cannot be voters. Officials cannot be qualified for election nor persons convicted of an offence involving a sentence of more than six months' imprisonment within 5 years from the expiration of the sentence. There are *general* and *special* constituencies. The *general* constituencies are divided into non-Mahomedan, European, non-European, and Sikh and *special* constituencies as those of Landholders, Universities, Commerce and Industry. The *franchise* for general constituencies is based on (1) community, (2) residence, and (3)(*a*) occupation or ownership of a building, (*b*) assessment to, or payment of municipal or cantonment rates or taxes or local cesses, or (4) the holding of land or membership of a local body. *The powers and limitations of the Indian Legislature* are defined in sec. 65 of the Act and are more or less similar to those contained in the India Councils Act of 1861 and its provisions have been interpreted judicially on several occasions.[64] The Indian Legislature has power to make, repeal or alter laws for all persons, all courts, all places and things within British India and in certain cases beyond British India, subject to the *limitations* that it cannot affect (*i*) any Act of Parliament relating to British India passed after 1860, (*ii*) any Act of Parliament enabling the Secretary of State in Council to raise money in the United Kingdom for the government of India, (*iii*) the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may

64. See *Empress* v. *Burah* discussed at pp. 24-25, *Secretary of State* v. *Moment* at p. 23, *Bugga* v. *King Emperor* at p. 149; see also *Mrs. Besant's case* 46IA 176 and *Lee* v. *Lee* I. L. R., 5 Lah. 147 (F. B.)

depend in any degree the allegiance of any person to the Crown of the United Kingdom, or affecting the sovereignty or dominion of the Crown over any part of British India and, (*iv*) without previous approval of the Secretary of State in Council to make any law empowering any court other than a High Court to sentence to death any of His Majesty's British-born subjects or their children, or abolishing any High Court. In addition to the above limitations, the special powers given by the Act to the Governor-General, over and above his power of veto under sec. 68(2), such as for instance, that measures of a certain kind[65] cannot be introduced without his previous sanction (sec. 67), that no demand for grant may be made except on his recommendation [sec. 67A (2)], his power of certifying a Bill rejected by either chamber of the Indian Legislature on the ground that it is essential for the safety, tranquillity or interests of British India or any part thereof under sec. 67B, power of making ordinance under sec. 72, etc., may be regarded as so many *additional limitations* to the power of the Indian Legislature. Again, certain heads of expenditure are "protected" from, and "non-votable" by, the Legislature, for example, Army, Foreign Department, the Church of England in India, the salaries and pensions of the members of the Imperial Services, etc. (67A, cl. 3). As regards *procedure for regulating the course of business* power is given by sec. 67(1) to make rules for the purpose. Thus debates on the budget are conducted under the restrictions imposed by the Act and the rules and orders

65. *E.g.*, (*a*) affecting public debt or revenues of India, (*b*) religion and religious rites and usages of British subjects in India, (*c*) discipline and maintenance of the military, naval or air forces, (*d*) relations with foreign princes or states, (*e*) any provincial subject declared by rules to be subject to Legislation by the Indian Legislature, (*f*) any Act of a Local Legislature and (*g*) any Act or Ordinance made by the Governor-Genral (*vide* sec. 67).

made under it. Time limit may be placed on speeches; points of order and procedure have to be decided by the President and so on. The *immunities and privileges* of the Legislatures have been already noticed.[66]

(*b*) *Provincial Legislatures.*—In every Governor's Province there is a Legislative Council. Unlike the Legislative Assembly, the Legislative Council is single chambered. The number of members is different in the different Provinces: Bengal, 125; Madras and the United Provinces, 118 each; Bombay, 111; Bihar and Orissa, 98; the Punjab, 83, the Central Provinces, 70; Assam, 53. The Governor is not a member of the Council, but has the right to address, to summon or to prorogue a council and also to nominate a certain number of members. There cannot be more than 20 per cent. official members in a Council and at least 70 per cent. must be elected. The members consist of (*a*) members of the Executive Council, (*b*) elected members, and (*c*) nominated members (sec. 73). As in the case of the Legislative Assembly, large powers are left to be exercised by Statutory rules under sec. 72A, clause 4. A large number of electoral rules have been framed under the section.

It has an elected (after the first four years) President and Vice-President approved by the Governor. The normal life of a Legislative Council is three years, the Governor having the power to dissolve it earlier or extend it further up to one year (sec. 72B, cl. 1). As in the case of the Indian Legislature, there are *general* and *special constituencies* such as that of landholders, commerce and industry. A voter if so qualified, may vote for as many 'special' constituencies, but only in *one* 'general'

66. See *ante*, p. 120; sec. 67, cl. 7, and sec. 78, cl. 4.

constituency, and even in that constituency his vote must be given *not as a citizen* but in some special capacity such as that of non-Mahomedan, Mahomedan, European or Anglo-Indian. This system of *communal electorates* is an objectionable feature of the present constitution as being opposed to the democratic principle of popular representation. The qualifications for electors for general constituencies are, though similar, not exactly uniform everywhere. Women have been given franchise only in Madras, Bombay and the United Provinces. Only 3 per cent. of the population have votes. In Madras five nominated seats have been reserved for the backward communities. As regards *powers and limitations* of the Provincial Legislatures they are specified in sec. 80A and other sections, from which it will appear that *the powers of the Provincial Legislatures are even far more curtailed than those of the Indian Legislature.* In the first place, all Bills passed by Local Councils are subject to *triple vetos*, that of the Governor (or Lieutenant-Governor or Chief Commissioner as the case may be), Governor-General (sec. 81) and the Crown (sec. 82). In the next place, there are many *other restrictions and limitations* such as (*i*) the following subjects are forbidden discussion and voting upon : (*a*) provincial contributions to the Central Government; (*b*) interest and sinking fund charges on loans ; (*c*) expenditure of which the amount is prescribed by any law ; (*d*) salaries and pensions of the members of the Imperial services ; (*e*) salaries of the Judges of the High Court and of the Advocate-General (sec. 72D, cl. 3) : (*ii*) the following subjects cannot be taken into consideration without previous sanction of the Governor-General : (*a*) imposing any new tax unless exempted by rules under the Act ; (*b*) questions affecting the public debt of India, or the customs duties or any

other tax or duty imposed by the Governor-General; (*c*) questions affecting the discipline on maintenance of the naval, military or air forces: (*iii*) by the preventive power of the Governor stopping any bill from being passed by the Council by certifying that it will affect the safety or tranquillity of his Province or any part thereof under sec. 72D (4): (*iv*) by the affirmative power of the Governor to certify a Bill, relating to a *reserved* subject and refused by the Council, that it is essential for the discharge of his responsibility for the subject under sec. 72E.(1), when the Act so certified will have to be sent to the Governor-General who will reserve it for the signification of His Majesty's pleasure which on being signified the Act shall have the same force and effect as an Act passed by the Local Legislature: (*v*) by the power of the Governor to propose draft of any Regulation for the peace and good government of any part of the Province under sec. 71, such draft having the force of law if approved by the Governor-General in Council and assented to by the Governor-General: (*vi*) by the provision under sec. 80 C that no member of any local Council can introduce without the previous sanction of the Governor or Lieutenant-Governor, etc., any measure affecting the public revenues of the Province or imposing any charge on those revenues: (*vii*) by the power given to the Governor under sec. 81A to return a Bill for reconsideration by the Council, or reserve the Bill for the consideration of the Governor-General: (*viii*) by the statutory enactment under sec. 72D that no demand for grant can be made except on the recommendation of the Governor and that in cases of emergency in regard to the *reserved* subjects the Governor can authorise expenditure inspite of refusal by the Council. The *limitation* in cl. 4 of sec. 80A to the effect that Local Legislatures

have not the power to make any law affecting any Act of Parliament has recently been interpreted by the Calcutta High Court in the case of *Girindra* v. *Birendra* and has been already noticed.[67]

The Judiciary.[68]—Development of the Judiciary in India during British rule, the powers which the Supreme Courts and the Sudder Dewanny and Fouzdary Adwalats possessed, the dual system of judiciary and its effects and other cognate matters have already been dealt with.[69] The present constitution, powers and jurisdiction of the High Courts are defined in Part IX, sections 101 to 114 of the Government of India Act. Sec. 101 deals with the constitution of the High Courts and the qualification of the judges. The maximum number of judges is fixed at 20, and of the number not less than one-third are to be barristers or advocates as prescribed, and one-third to be members of the Civil Service. Unlike the High Court judges in England who hold office during good behaviour and can be dismissed only on an address by both Houses of Parliament, the Judges of the High Courts in India hold office during His Majesty's pleasure. The High Courts in the three Presidency Towns have inherited all the powers and functions of the old Supreme and Sadar Courts. They possess original civil and criminal jurisdiction besides appellate jurisdiction. The High Courts at Allahabad established in 1865, Patna (1916) and Lahore (1919) have only appellate jurisdiction while the Burma High Court has both original and appellate jurisdiction. Sec. 106 deals with the jurisdiction of the High Courts. It says the powers are defined by their respective Letters

67. See *ante*, Ch. VI, pp. 151-152.

68. For the subordinate Judiciary readers may refer to Trevelyan's Civil Courts in India.

69. See *ante* pp. 352-356, 364-367, 377-381, 385.

Patent, and subject to their provisions, the High Courts are vested with all such jurisdictions, powers and authority as they respectively possess at the commencement of the Government of India Act of 1919. Schedule V of the Act has expressly given power to the Indian Legislature to alter "the jurisdiction, powers and authority" of the High Courts as defined in sec. 106.[70] The Governor-General in Council is given power under sec. 109 to alter the local limits of the jurisdiction subject to being disallowed by the Crown.

Defects of the Government of India Act of 1919.— The following are some of the principal defects alleged against the Act :—

(1) Entire absence of the principle of responsibility in the Central Government.

(2) Defects in the system of dual government (*Dyarchy*) introduced in the Provinces.

(3) Limited powers of the Central and Provincial Legislatures.

(4) Absence of Control of the Legislatures over Finance, the Executive and the Civil Services.

(5) Absence of Parliamentary Executive.

(6) Large powers of the Governor-General and the Governors.

(7) Defect in the composition of the Legislatures as including nominated and official members.

(8) Introduction of Communal electorates.

See *ante*, Ch. VI, p. 132.

Constitutional advance since the Morley-Minto Act.—

(1) Under the Morley-Minto Act, Government was wholly autocratic, and local Governments were subject to the control in India, of the Governor-General and his Council, and in England, to the Secretary of State responsible to Parliament. The present Act has introduced partially the democratic principle (responsible government) in regard to the transferred subjects in the Governor's Provinces, and also to a certain extent released the Local Governments from the parental tutelage of the Central Government by making a distinction between Central and Provincial subjects and devolving authority on the Provincial Governments in regard to the latter.

(2) The present Act has replaced official majority in the Central Legislature by a non-official majority.

(3) Under the Morley-Minto Act the budget could only be discussed, questions asked and recommendations made. Under the present Act supplies have to be voted in the form of demands for grants.

(4) The present Act as supplemented by statutory rules has carried the principle of representation of special interests in the Legislatures a good deal further than the Morley-Minto Act, relying for that purpose, more on election than on nomination.

(5) Under the present Act, the constitution has been made elastic and flexible through the agency of statutory rules framed under delegated powers of legislation.

(6) Bi-cameral system has been introduced in the Central Legislature.

(7) The Governor-General and the Governors are not members of the Legislatures any longer.

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